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A

SELECTION OF CASES

ON THE

LAW OF CONTRACTS

A

SELECTION OF CASES

ON THE

LAW OF CONTRACTS

EDITED AND ANNOTATED

BY

SAMUEL WILLISTON

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY

SECOND EDITION

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PREFACE TO THE SECOND EDITION

THE general plan and the subdivisions of this collection of cases remain unchanged from the first edition, with the exception of the Chapter on the Statute of Frauds. Various provisions of that statute are customarily studied in courses on property, sales, suretyship and trusts, and there seems little use in inserting a treatment — inadequate at best — of such provisions in a selection of cases on contracts. Accordingly in this edition the only clause of the Statute dealt with is that relating to contracts not to be performed within a year. The space thus gained has made it possible to compress the work into a simple volume and nevertheless insert a number of important late decisions.

When the first edition was published there was no recent comprehensive treatise on the laws of contracts, and for that reason the collection of decisions in the notes to the cases was somewhat elaborate. To bring these annotations down to the present time with similar fullness would have undesirably expanded the size of the book and in view of the existence of several newly published exhaustive treatises on the subject has seemed unnecessary.

SAMUEL WILLISTON.

Cambridge, 1922

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PREFACE TO THE FIRST EDITION

THE plan of this book needs little explanation. I have endeavored, in the light of all that has been done before, to prepare a selection of cases on the law of contracts adapted to the use of students. In order to cover the subject fairly in two volumes of reasonable size, I have been obliged frequently to shorten the reports of cases. Arguments of Counsel have been generally omitted, and where the opinion of the court contains an adequate statement of facts, the opinion only has been printed. I have thought this general statement would be sufficient warning to the reader of such omissions. When other changes from the original reports have been made, they are specifically indicated. Head-notes are of course omitted, and for the same reason the headings of chapters and sections are general, and the subdivision of topics is not always as minute as might be convenient to one seeking authority on a particular matter. Headings of sections may easily be made a key to the results of the cases, and it is desirable for the student to work out this result for himself with the aid only of such suggestion as proves necessary in the class-room. The annotations, for the same reason, are mostly confined to lists of cases in accord or opposed to the case which is printed. An index at the end of the second volume, I hope, will make the contents of the book reasonably accessible without being open to the objection of giving the student the answer before he has done the problem.

Every teacher of law who prepares a volume of cases for the instruction of students is consciously or unconsciously indebted to the work of Professor Langdell; but an indebtedness greater than that which every worker owes to the pioneer in his chosen field, must here be acknowledged. The law of contracts was the subject selected by Professor Langdell for his first collection of cases. That collection, first published in 1871 and a second edition in 1876,

has been used continuously since its publication in the Harvard Law School, and in recent years in other law schools. The development of the law during the past thirty years has now made it desirable to substitute a new book for one which must be regarded as marking an epoch in legal education. In preparing the new book, I should have found it impossible, had I made the attempt, to avoid deriving benefit from the selection and arrangement in the earlier book. Fortunately, no such effort has been necessary, since Professor Langdell has kindly permitted me to make such use as I wished of his work. Of this permission I have freely availed myself.

SAMUEL WILLISTON

Cambridge, 1903

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CASES ON CONTRACTS

CHAPTER I

FORMATION OF SIMPLE CONTRACTS

SECTION I

MUTUAL ASSENT

A. — Offer

PAYNE *v.* CAVE

In the King's Bench, May 2, 1789

[*Reported in* 3 *Term Reports,* 148]

This was an action tried at the Sittings after last term at Guildhall, before Lord Kenyon, wherein the declaration stated that the plaintiff, on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c., of all which premises the defendant afterwards, to wit, &c., had notice; and thereupon the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale to be performed by the plaintiff as seller, &c., undertook, and then and there promised the plaintiff to perform the conditions of the sale to be performed on the part of the buyer, &c. And the plaintiff avers that the conditions of sale hereinafter mentioned are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days' time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for 40*l.* and was requested to pay the usual deposit, which he refused, &c. At the trial, the plaintiff's counsel opened the case thus: The goods were put up in one lot at an auction; there were sev-

eral bidders, of whom the defendant was the last, who bid 40*l.*; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt., and was worth more than 40*l.*; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30*l.* to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller; in the meantime, the person who did bid last is a conditional purchaser, if nobody bids more. Otherwise, it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The case of Simon *v.* Motivos,[1] which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

The Court thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Rule refused.[2]

COOKE *v.* OXLEY

In the King's Bench, May 14, 1790

[*Reported in* 3 *Term Reports*, 653]

This was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, &c., a cer-

[1] 3 Burr. 1921.

[2] Uniform Sales Act, § 21(2); Hibernia Sav. Soc. *v.* Behnke, 121 Cal. 339; Mallard *v.* Curran, 123 Ga. 872, 875; Grotenkemper *v.* Achtermyer, 11 Bush. 222; Head *v.* Clark, 88 Ky. 362, 364; Fisher *v.* Seltzer, 23 Pa. 308; German Civ. Code, § 156, *acc.*

tain discourse was had, &c., concerning the buying of two hundred and sixty-six hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said two hundred and sixty-six hogsheads [at a certain price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day;* the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant *to deliver* to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, &c.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise,

Erskine and *Wood* now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before four o'clock, yet, not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not *delivering* the tobacco, and not for not selling it.

Lord Kenyon, Ch. J. (stopping Bearcroft, who was to have argued in support of the rule): Nothing can be clearer than that, at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum.*

Buller, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant: but here was neither when the contract was first made. Then, as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time.

Grose, J. The agreement was not binding on the plaintiff before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise.

Rule absolute.[1]

[1] This judgment was affirmed in the Exchequer Chamber: M. 32 Geo. 3. Head *v.* Diggon, 3 Man. & Ry. 97, *acc.* See also Routledge *v.* Grant, 4 Bing. 653.

ADAMS and Others *v.* LINDSELL and Another

In the King's Bench, June 5, 1818

[*Reported in* 1 *Barnewall & Alderson,* 681]

Action for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool at St. Ives, in the county of Huntingdon, had on Tuesday, the 2d of September, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, *Worcestershire:* "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35*s.* 6*d.* per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, *receiving your answer in course of post.*"

This letter was misdirected by the defendants to Bromsgrove, *Leicestershire,* in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p.m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants, not having, as they expected, received an answer on Sunday, September 7th (which, in case their letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances, the learned Judge held that, the delay having been occasioned by the neglect of the defendants, the jury must take it that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule *nisi* for a new trial, on the ground that there was no binding contract between the parties,

Dauncey, Puller, and *Richardson* showed cause. They contended that, at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis and *Campbell* in support of the rule. They relied on Payne *v.* Cave, and more particularly on Cooke *v.* Oxley. In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time, at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who

have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons. But

The Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post. *Rule discharged.*

NYULASY *v.* ROWAN

Supreme Court of Victoria, May 7–June 23, 1891

[*Reported in* 17 *Victorian Law Reports,* 663]

Higinbotham, C. J. This is an appeal from a judgment of Molesworth, J. The statement of claim contains three alternative causes of action. The first of these, for shares bargained and sold, was abandoned at the hearing. The second was founded on a verbal agreement alleged to have been made by and between the plaintiff and the defendant on 21st July, 1890, by which it was agreed, in consideration, that the plaintiff would not proceed at that time to sell 400 shares, which he held in the Melbourne Tramway and Omnibus Company, at the then market price, and would not place the shares at that time on the market for sale at that price, that the defendant should, on being requested by the plaintiff so to do, at any time within three months from 21st July, 1890, purchase from the plaintiff his said 400 shares at the price of 8*l.* each. The plaintiff alleged performance of this agreement on his part — a request made by him to the defendant to purchase the shares on or about 21st August, 1890, and a refusal by the defendant to purchase. The learned primary judge held that this agreement was made between the parties on 21st July, and that it was broken by the defendant, and he gave judgment for the plaintiff on this claim. The third alternative cause of action was founded upon a verbal offer alleged to have been made by the defendant to the plaintiff on or about 21st July to purchase the plaintiff's 400 shares at the price of 8*l.* per share, such offer to remain open

three months from that date; acceptance of the offer by the plaintiff on or about 21st August, within the three months, and while the defendant's offer was still open and unretracted, and refusal by the defendant to accept the shares. The learned judge found that the plaintiff had established by proof this claim as well as the second, and he gave judgment on it for the plaintiff.

The defendant now appeals against this judgment on both grounds. With regard to the second ground of claim it has been contended that there was no agreement between the parties on 21st July, as there was no consideration for the promise which it was admitted the defendant gave on that day. The plaintiff's answer to this argument is that there is evidence of a request then made by the defendant that the plaintiff should not immediately sell his shares or place them on the market, and that such request, if complied with by the plaintiff, was a good consideration for the defendant's promise. Crears *v.* Hunter.[1] The question, then, that is raised upon this part of the case is whether there was any evidence upon which the judge might reasonably act, that the defendant did at that time really, and not by way of banter only,[2] request the plaintiff not to sell his shares or place them on the market. We are of opinion that there was such evidence. The defendant's answer to the whole claim of the plaintiff was that, having been asked by a friend of the plaintiff, who was anxious and distressed by the falling state of the market, to comfort the plaintiff, he spoke to the plaintiff jocularly only, intending to comfort him, and that he gave him an unreal and false promise without intending to perform it. The defendant, however, admits that the plaintiff did not seem to take his words of comfort as a joke. Now, the judge has found upon evidence amply sufficient that this defence is untrue, that the defendant spoke to the plaintiff, not in joke, but in earnest, and influenced by a desire to protect the stock of which he was a large holder himself. Then, as regards a request, the plaintiff swore that the defendant said to him on 21st July: "Don't be foolish to sell now and lose money." The defendant, in answer to an interrogatory, stated that he did not, to the best of his knowledge, information, or belief, say to the plaintiff: "Your trams are all right; don't be so foolish as to sell them at a loss;" but he admits that he may have used words to that effect. Now, assuming, as we are bound to do, that the defendant spoke at this conversation seriously, and that he was using the opportunity then represented to him to make in his own interest and for his own advantage a *bona fide* offer to the plaintiff, who accepted his words

[1] 19 Q. B. D. 341.

[2] Keller *v.* Holderman, 11 Mich. 248, was an action on a check given for a silver watch. The trial judge found "the whole transaction was a frolic and banter — the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn," but held the defendant liable. The Supreme Court reversed this judgment on the ground that "no contract was ever made by the parties." McClurg *v.* Terry, 21 N. J. Eq. 225; Bruce *v.* Bishop, 43 Vt. 161, *acc.* *Cf.* Deitrick *v.* Sinnott (Ia.) 179 N. W. 424; Armstrong *v.* McGhee, Add. (Pa.) 261.

seriously, what is the meaning that should be given to these words, or words to the like effect then uttered by the defendant? The judge has found that forbearance by the plaintiff to sell his shares was on account of an implied, though perhaps not an express, request by the defendant. I should be inclined to say that these words might be taken to convey an express request by the plaintiff not to sell. We are of opinion that they are evidence, either express or by implication, of such a request; that the judge was justified in concluding that a request was made by the defendant, and that it was in consequence of such request that the plaintiff forbore to sell his shares. The judgement, therefore, cannot be disturbed on this ground.

With respect to the third alternative ground of action, it has been contended, for the defendant, that there must be consideration for a continuing offer of this kind, that the plaintiff did not accept the offer at the time it was made, and that when he did accept it the defendant had changed his mind; so that, treating the transaction of 21st July as an offer only and not as a contract, the parties never were *ad idem,* and no contract was entered into between them subsequently to 21st July. In support of this view, Cooke *v.* Oxley[1] was relied on. The effect and the authority of that case have been the subject of some controversy which is still unsettled. See Benjamin on Sales (4th. ed.), p. 69; Pollock on Principles of Contract (5th ed.), p. 25, note. Cooke *v.* Oxley,[1] which was decided on a motion in arrest of judgment, may be supported on the ground that the declaration did not aver that the defendant actually left the offer open until the hour named, but only that he promised to do so.[2] But if Cooke *v.* Oxley is to be supported upon this ground of pleading, it would not govern the present case, where it is alleged in the statement of claim and proved in evidence, that the plaintiff by letter accepted the offer while it was still open and unretracted. Unless, therefore, there is some distinction to be drawn between an offer by letter or telegram and an offer by word of mouth, and we are not aware of any reason or authority for such a distinction; see per Lush, J., in Stevenson *v.* McLean;[3] the present case comes within the artificial but convenient explanatory rule laid down in Adams *v.* Lindsell,[4] and the offer of the defendant on 21st July, unsupported by any consideration, must be considered in law as having been made by the defendant during every instant of the intervening time until 19th August, when a contract was made between the parties by the plaintiff's letter, accepting the offer and tendering his shares to the defendant. The defendant has failed, in

[1] *Ante,* p. 2.

[2] "The offer was not limited in time, and the presumption is, that it was open on the fifth day after it was made, nothing to the contrary appearing. The revocation of it, if it had been revoked, was matter of defence." Wilson *v.* Stump, 103 Cal. 255, 258. See also, Quick *v.* Wheeler, 78 N. Y. 300.

[3] 5 Q. B. D. 351.

[4] *Ante,* p. 4.

our opinion, on this ground also to show that the judgment was wrong. *The appeal will be dismissed with costs.*

SPENCER AND ANOTHER *v.* HARDING AND OTHERS

IN THE COMMON PLEAS, June 29, 1870

[*Reported in Law Reports, 5 Common Pleas,* 561]

THE second count of the declaration stated that the defendants by their agents issued to the plaintiffs and other persons engaged in the wholesale trade a circular in the words and figures following; that is to say, "28 King Street, Cheapside, May 17th, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. G. Eilbeck & Co., of No. 1 Milk Street, amounting as per stock-book to 2,503*l.* 13*s.* 1*d.*, and which will be sold at a discount in one lot. Payment to be made in cash. The stock may be viewed on the premises, No. 1 Milk Street, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us, sealed and inclosed, 'Tender for Eilbeck's stock.' Stock-books may be had at our office on Tuesday morning. Honey, Humphreys & Co." And the defendants offered and undertook to sell the said stock to the highest bidder for cash, and to receive and open the tenders delivered to them or their agents in that behalf, according to the true intent and meaning of the said circular. And the plaintiffs thereupon sent to the said agents of the defendants a tender for the said goods, in accordance with the said circular, and also attended the said sale at the time and place named in the said circular. And the said tender of the plaintiffs was the highest tender received by the defendants or their agents in that behalf. And the plaintiffs were ready and willing to pay for the said goods according to the true intent and meaning of the said circular. And all conditions were performed, etc., to entitle the plaintiffs to have their said tender accepted by the defendants, and to be declared the purchasers of the said goods according to the true intent and meaning of the said circular; yet the defendants refused to accept the said tender of the plaintiffs, and refused to sell the said goods to the plaintiffs, and refused to open the said tender or proceed with the sale of the said goods, in accordance with their said offer and undertaking in that behalf, whereby the plaintiffs had been deprived of profit, etc.

Demurrer, on the ground that the count showed no promise to accept the plaintiffs' tender or sell them the goods. Joinder.

Holl., in support of the demurrer.

Morgan Lloyd, contra.

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder, — that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons.[1] But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for the defendants.[2]

[1] See Warlow *v.* Harrison, 1 E. & E. 295; Mainprice *v.* Westley, 6 B. & S. 420; Harris *v.* Nickerson, L. R. 8 Q. B. 286; South Hetton Coal Co. *v.* Haswell, [1898] 1 Ch. 465; Johnston *v.* Boyes, [1899] 2 Ch. 73; Tillman *v.* Dunman, 114 Ga. 406; McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277; 57 L. R. A. note.

[2] In Rooke *v.* Dawson [1895] 1 Ch. 480, the announcement of an examination for a scholarship was held not to amount to an offer to award the scholarship to such applicant as should fulfil the requirements of the trust deed under which the scholarship fund was held. Compare Neidermeyer *v.* Univ. of Missouri, 61 Mo. App. 654.

ARCHIE D. SANDERS ET AL., APPELLANTS, *v.* POTTLITZER BROS. FRUIT COMPANY, RESPONDENT

NEW YORK COURT OF APPEALS, December 7–18, 1894

[*Reported in* 144 *New York,* 209]

O'BRIEN, J. The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made so as to become binding upon the parties. On the 28th of October, 1891, the plaintiffs submitted to the defendant the following proposition in writing:

"BUFFALO, N. Y., Oct. 28, 1891.

"MESSRS. POTTLITZER BROS. FRUIT CO., Lafayette, Ind.:

"GENTLEMEN, — We offer you ten carloads of apples to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one-half green fruit, balance red fruit, to be shipped as follows: —

"First car between 1st and 15th December, 1891.

"Second car between 15th and 30th December, 1891, and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of $2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars, this proposition to be accepted not later than the 31st inst., and you to pay us $500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of $100 per car on the last five cars.

"Yours respectfully, "J. SANDERS & SON."

To this proposition the defendant replied by telegraph on October 31st as follows:—

"LAFAYETTE, IND., 31st October.

"J. SANDERS & SON:

"We accept your proposition on apples, provided you will change it to read 'car every eight days from January first, none in December;' wire acceptance.

"POTTLITZER BROS. FRUIT CO."

On the same day the plaintiffs replied to this despatch to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiffs' telegram as follows: —

"Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract and we will then forward draft.

"POTTLITZER BROS. FRUIT CO."

The matter thus rested till November 4, when the plaintiffs received the following letter from the defendant: —

"LAFAYETTE, IND., November 2, 1891.

"J. SANDERS & SON, Stafford, N. Y.:

"GENTS, — We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and, therefore,

we do not think it advisable to take the contract unless you made it read for shipment from the 1st of January. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract so as to read as we wired you we will accept it and forward you draft in payment on same. "POTTLITZER FRUIT CO."

On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph: —

"November 4th.

"POTTLITZER BROTHERS FRUIT COMPANY, Lafayette, Ind.:

"Letter received. Will accept conditions. If satisfactory, answer and will forward contract. "J. SANDERS & SON."

The defendant replied to this message by telegraph saying: "All right, send contract as stated in our message." The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: (1) That the fruit should be well protected from frost and well hayed; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence and I think cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal. The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiffs' original proposition but the defendant's assent to it in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper which, when signed, should be the evidence of what had already been agreed upon. But neither party

was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party, it was unauthorized. Hence the defendant, by insisting upon further material conditions not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition as originally made and the subsequent letters and telegrams, and if they constituted a contract of themselves the absence of the formal agreement contemplated was not under the circumstances material. When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed.

But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. Vassar *v.* Camp, 11 N. Y. 441; Brown *v.* Norton, 50 Hun, 248; Pratt *v.* H. R. R. R. Co., 21 N. Y. 308. The principle that governs in such cases was clearly stated by Judge SELDEN in the case last cited in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract, embodying these terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met through the correspondence upon all the terms as well as the subject-matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where by changes in the market or other events occurring subsequent to the written negotiations it

became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying of cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever. The principle, therefore, which is involved in the case is this, Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if at the close of the correspondence the plaintiffs became bound by their offer and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of great confusion and uncertainty into the law of contracts. If the parties did not become bound in this case, they cannot be bound in any case until the writing is executed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except Earl, Gray, and Bartlett, JJ., dissenting.

Judgment reversed.[1]

[1] In the following cases it was held that there was a contract, though it was agreed that a written contract should be subsequently prepared. Bonnewell *v.* Jenkins, 8 Ch.

DANIEL R. DONNELLY, Defendant in Error, *v.* THE CURRIE HARDWARE COMPANY, Plaintiff in Error

New Jersey Supreme Court, February 27–June 10, 1901.

[*Reported in* 66 *New Jersey Law,* 388.]

Dixon, J. The plaintiff, being about to bid for a contract to build a music pavilion in Atlantic City, submitted the plans and specifications to the defendant for an estimate as to the price at which the latter would do the metal work required, and on March 31st, 1899, received a letter from the defendant saying that it would do the work for $2,650. Accordingly the plaintiff put in his bid for the construction of the building, and, after the making of some changes, not affecting the metal work, the job was awarded to him and the contract was signed on April 5th, 1899. During the next morning the plaintiff telephoned to the defendant's manager that he had signed a contract for the building, and would be prepared to sign a written contract with the defendant at four o'clock that afternoon, to which the manager answered "all right." Shortly before that hour the plaintiff telephoned to the manager that he had not had time to prepare the contract, and would sign it in the morning, to which the manager again replied "all right." The next morning the plaintiff called on the manager, and the latter informed the plaintiff that the defendant would be unable to perform the work in the time agreed upon by the plaintiff, and had not room to do the work so quickly, and refused to sign the proposed contract. Afterwards the plaintiff was compelled to pay a higher price for the metal work, and brought this suit for breach of contract. On this state of facts, shown by the plaintiff's evidence, the defendant moved for a nonsuit and for direction of a verdict in favor of defendant. These motions being overruled, exceptions were sealed.

The case is governed by the rule established in Water Commissioners *v.* Brown, 3 Vroom, 504, 510, where Mr. Justice Elmer, speaking for the Court of Errors, said: "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side." The conversations over the telephone between the plaintiff and the defendant's manager, as well as the testimony of the plaintiff himself, make it clear that a written contract was expected by both parties. Indeed, it cannot reasonably be determined

D. 70, 73; Bolton *v.* Lambert, 41 Ch. D. 295; Bell *v.* Offutt, 10 Bush, 632; Montague *v.* Weil, 30 La. Ann. 50; Allen *v.* Chonteau, 102 Mo. 309; Green *v.* Cole (Mo.), 24 S. W. Rep. 1058; Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266; Blaney *v.* Hoke, 14 Ohio St. 292; Mackey *v.* Mackey's Adm. 29 Gratt. 158; Paige *v.* Fullerton Woolen Co., 27 Vt. 485; Lawrence *v.* Milwaukee &c. Ry. Co., 84 Wis. 427; Cohn *v.* Plumer, 88 Wis. 622.

that the parties had agreed upon all the matters which they would expect to have included in their bargain, for the time allowed for the beginning and completion of the work and the mode of payment are generally provided for expressly in such arrangements, and on these points their negotiations had been silent, awaiting probably the outcome of the plaintiff's proposal for the erection of the building.

We therefore think that no contract was made by the defendant, and that the motions mentioned should have prevailed.

The judgment is reversed.[1]

JOHNSTON BROTHERS *v.* ROGERS BROTHERS

ONTARIO HIGH COURT OF JUSTICE, February 2, 1899

[*Reported in* 30 *Ontario,* 150]

AN appeal by the defendants from the judgment of WILLIAM ELLIOTT, senior Judge of the County Court of Middlesex, in favour of the plaintiffs in an action in that Court, the facts of which are fully set out in the following [portion of the] opinion delivered by that Judge: —

The plaintiffs are bakers, and seek to recover damages from the defendants for breach of a contract for the sale and delivery of a quantity of flour.

The following letter is the basis of the plaintiffs' claim: —

"TORONTO, April 26, 1898.

"DEAR SIR, — We wish to secure your patronage, and, as we have found the only proper way to get a customer is to save him money, we therefore are going to endeavor to save you money.

"It is hardly prudent for us to push the sale of flour just now, as prices are sure

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[1] In the following cases it was held that no contract existed until the execution of a written contract, the signing of which was one of the terms of a previous agreement. Ridgway *v.* Wharton, 6 H. L. C. 238, 264, 268, 305; Chinnock *v.* Marchioness of Ely 4 De G. J. & S. 638, 646; Winn *v.* Bull, 7 Ch. D. 29; Spinney *v.* Downing, 108 Cal. 666; Fredericks *v.* Fasnacht, 30 La. Ann. 117; Ferre Canal Co. *v.* Burgin, 106 La. 309; Mississippi, &c. S. S. Co. *v.* Swift, 86 Me. 248; Willes *v.* Carpenter, 75 Md. 80; Lyman *v.* Robinson, 14 Allen, 242; Sibley *v.* Felton, 156 Mass. 273; Morrill *v.* Tehama Co., 10 Nev. 125; Water Commissioners *v.* Brown, 32 N. J. L. 504; Brown *v.* N. Y. Central R. R. Co., 44 N. Y. 79; Commercial Tel. Co. *v.* Smith, 47 Hun, 494; Nicholls *v.* Granger, 7 N. Y. App. Div. 113; Arnold *v.* Rothschild's Sons Co., 37 N. Y. App. Div. 564, aff'd 164 N. Y. 562; Franke *v.* Hewitt, 56 N. Y. App. Div. 497; Congdon *v.* Darcy, 46 Vt. 478. See also Jones *v.* Daniel, [1894] 2 Ch. 332.

In Mississippi, &c. S. S. Co. *v.* Swift, 86 Me. 248, 258, the Court said: "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed."

to advance at least 50 cents per barrel within a very few days, and give you the advantage of a cut of from 20 to 25 cents per barrel seems a very foolish thing, but nevertheless we are going to do it, just to save you money and secure your patronage.

"We quote you (R. O. B. or F. O. B.) your station, Hungarian $5.40, and strong Bakers $5.00, car lots only, and subject to sight draft with bill of lading.

"We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter would reach us.

"Yours respectfully,

"ROGERS BROS."

This communication was received by the plaintiffs on the 27th April. The plaintiffs telegraphed the defendants the same morning as follows:—

"LONDON, April 27, 1898.

"To ROGERS BROS., Confederation Life Building, Toronto.

"We will take two cars Hungarian at your offer of yesterday.

"JOHNSTON BROS."

On the same day, namely, the 27th April, the plaintiffs received the following communication by telegraph:—

"TORONTO, ONT., April 27, 1898.

"Flour advanced sixty. Will accept advance of thirty on yesterday's quotations. Further advance certain.

"ROGERS BROS."

Then followed a letter, dated the 28th April, from Messrs. Hellmuth & Ivey, solicitors for the plaintiffs, calling upon the defendants to fulfil the order "according to the offer contained in your letter of the 26th and duly accepted by them by wire on April 27th; and upon your refusal damages will be demanded."

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 26th January, 1899.

W. Carleill-Hall and *J. W. Payne,* for the defendants.

Hellmuth, for the plaintiffs.

FALCONBRIDGE, J.—The facts and the correspondence are fully set out in the very careful judgment of the learned Judge.

I shall not refer to the second and third grounds of appeal further than to say that they have been fully considered, and, to my mind, satisfactorily disposed of, by the trial Judge.

The real crux of the case is whether there is a contract.

Leaving out the matters of inducement (in both the legal and the ordinary sense) in the letter of the 26th, the contract, if there is one, is contained in the following words:—

LETTER, DEFENDANTS TO PLAINTIFFS

"27th April, 1898.

"We quote you, F. O. B. your station, Hungarian $5.40 and strong Bakers $5.00, car lots only, and subject to sight drafts with bills of lading."

TELEGRAM, PLAINTIFFS TO DEFENDANTS

"27th April, 1896.

"We will take 2 cars Hungarian at your offer of yesterday."

I should expect to find American authority as to the phrase "we quote you," which must be in very common use amongst brokers, manufacturers, and dealers in the United States; but we were

referred to no decided case, and I have found none where that phrase was used.

In the "American and English Encyclopedia of Law," 2d ed., vol. 7, p. 138, the law is stated to be: "A quotation of prices is not an offer to sell, in the sense that a complete contract will arise out of the mere acceptance of the rate offered or the giving of an order for merchandise in accordance with the proposed terms. It requires the acceptance by the one naming the price, of the order so made, to complete the transaction. Until thus completed there is no mutuality of obligation."

Of the cases cited in support of this proposition, Moulton *v.* Kershaw (1884), 59 Wis. 316, 48 Am. Rep. 516, is the nearest to the present one, but in none is the word "quote" used.

The meaning of "quote" is given in modern dictionaries as follows: —

"Standard" (Com.) — To give the current or market price of, as bonds, stocks, commodities, etc.

"Imperial," ed. 1884 — In com., to name as the price of an article; to name the current price of; as, what can you quote sugar at?

"Century" (Com.) — To name as the price of stocks, produce, etc.; name the current price of.

"Webster" (Com.) — To name the current price of.

"Worcester" — To state the price as the price of merchandise.

See also "Black's Law Dictionary," subtit. "Quotation."

There is little or no difference between any of these definitions. Now if we write the equivalent phrase into the letter — "We give you the current or market price, F. O. B. your station, of Hungarian Patent $5.40 — " can it be for a moment contended that it is an offer which needs only an acceptance in terms to constitute a contract?

The case of Harty *v.* Gooderham (1871), 31 U. C. R. 18, is principally relied on by the plaintiffs. But that case presents more than one point of distinction. There the first inquiry was from the plaintiff, which, I think, is an element in the case. He writes the defendants to let him "know your lowest prices for 50 O. P. spirits," etc. To which defendants answered, mentioning prices and particulars: "Shall be happy to have an order from you, to which we will give prompt attention," which the court held to be equivalent to saying "We will sell it at those prices. Will you purchase from us and let us know how much?" And so the contract was held to be complete on the plaintiff's acceptance.

But there is no such offer to sell in the present defendant's letter. Harvey *v.* Facey (1893), A. C. 552, is strong authority against the plaintiffs.

I have not overlooked the concluding paragraph of the letter, viz., "We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter

would reach us." The learned Judge considers this to be one of the matters foreign to a mere quotation of prices. I venture, on the contrary, to think that this suggestion is more consistent with a mere quotation of prices, which might vary from day to day or from hour to hour. There could be no question of the prices becoming "beyond reach" in a simple offer to sell at a certain price.

In my opinion, the plaintiffs have failed to establish a contract, and this appeal must be allowed with costs, and the action dismissed with costs.

See also Thorne *v.* Butterworth (1866), 16 C. P. 369; Am. & Eng. Encyc. of Law, 2d ed., vol. 7, pp. 125, 128, 133, 138; Ashcroft *v.* Butterworth (1884), 136 Mass. 511; Fulton *v.* Upper Canada Furniture Co. (1883), 9 A. R. 211.[1]

T. F. SEYMOUR *v.* ARMSTRONG & KASSEBAUM

KANSAS SUPREME COURT, January Term, 1901

[*Reported in* 62 *Kansas,* 720]

JOHNSON, J.[2] This was an action to recover damages for the breach of an alleged contract. On February 15, 1896, Armstrong & Kassebaum, commission merchants of Topeka, inserted an advertisement in a weekly newspaper, which, among other things, contained the following proposition: —

"We will pay 10½ cents net, Topeka, for all fresh eggs shipped us to arrive here by February 22. Acceptance of our bid with number of cases stated to be sent by February 20."

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[1] In Moulton *v.* Kershaw, 59 Wis. 316, the defendants, salt dealers, wrote to the plaintiff, a dealer in salt, accustomed to buy salt in large quantities as the defendants knew, as follows: —

"DEAR SIR, — In consequence of a rupture in the salt trade we are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels, delivered at your city at 85 cents per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order."

The plaintiff, on the day this letter reached him, telegraphed: —

"Your letter of yesterday received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt as offered in your letter. Answer."

The defendants replied on the following day, refusing to fill the order.

The Court held that no contract had been created, chiefly because the defendants' letter did not specify any limit of quantity.

In Beaupré *v.* Pacific & Atlantic Telegraph Co., 21 Minn. 155, the plaintiffs wrote: "Have you any more northwestern mess pork? also extra mess? Telegraph price on receipt of this." The reply was telegraphed: "Letter received. No light mess here. Extra mess $28.75." The plaintiffs replied by telegraph: "Despatch received. Will take two hundred extra mess, price named." The Court held there was no contract.

Harvey *v.* Facey, [1893] A. C. 552; Talbot *v.* Pettigrew, 3 Dak. 141; Knight *v.* Cooley, 34 Ia. 218; Smith *v.* Gowdy, 8 Allen, 566; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, *acc.* See also Kinghorne *v.* Montreal Tel. Co. U. C. 18 Q. B. 60; Sellers *v.* Warren, 116 Me. 350; Stein-Gray Drug Co. *v.* Michelsen Drug Co. 116 N. Y. Supp. 789.

[2] A portion of the opinion is omitted.

On February 20, 1896, T. F. Seymour, a rival commission merchant of Topeka, sent the following note to Armstrong & Kassebaum in response to their proposition: —

"I accept your offer in 'Merchants' Journal,' 10½ cents, Topeka, for fresh eggs, and will ship you on C. R. I. & P. R. R. 450 cases fresh eggs, to arrive on or before February 22. The eggs are all packed in new No. 2 whitewood cases, and I will accept fifteen cents each for them, or you can return them or new ones in place of them."

On receipt of this note, Armstrong & Kassebaum at once notified Seymour that they would not accept the eggs on the terms proposed by him. Notwithstanding the refusal, Seymour procured a car and loaded it with eggs. Not having a sufficient number of cases to fill the car, he found two other commission merchants who were willing to co-operate with him, and who furnished 190 of the 450 cases, which were loaded in Topeka, only a few hundred feet away from the place of business of Armstrong & Kassebaum, sealed up, and then pushed a short distance over to their business house. They refused to receive the eggs, and Seymour shipped them to Philadelphia, where they were sold for $391.83 less than they would have brought at the price named in Seymour's note of acceptance. For this amount the present action was brought, and the plaintiff is entitled to recover, if the defendants' offer on eggs was unconditionally accepted. At the trial a verdict was returned in favor of the defendants, and the result of the general finding is that the pretended acceptance of Seymour was not unconditional, and that no contract was, in fact, made between him and the defendants.

Did the negotiations between the parties result in a contract? A contract may originate in an advertisement addressed to the public generally, and if the proposal be accepted by any one in good faith, without qualifications or conditions, the contract is complete. The fact that there was no limit as to number or quantity of eggs in the offer did not prevent an acceptance. The number or quantity was left to the determination of the acceptor, and an unconditional acceptance naming any reasonable number or quantity is sufficient to convert the offer into a binding obligation. It is essential, however, that the minds of the contracting parties come to the point of agreement — that the offer and acceptance coincide; and if they do not correspond in every material respect there is no acceptance or completed contract. In our view, the so-called acceptance of the plaintiff is not absolute and unconditional. It affixed conditions not comprehended in the proposal, and there could be no agreement without the assent of the proposer to such conditions. It is true the plaintiff agreed to furnish eggs at 10½ cents per dozen, but his acceptance required the defendant to pay fifteen cents each for the cases in which the eggs were packed or to return the cases or new ones in place of them. It appears from the record that, according to the usages of the business, the cases go with the eggs.

THE SATANITA

COURT OF APPEAL, March 28, 1895

[*Reported in Law Reports,* [1895] *Probate,* 248]

ACTION of damage by collision. The "Valkyrie" and the "Satanita" were manœuvring to get into position for starting for a fifty-mile race at the Mudhook Yacht Club regatta, when the "Satanita" ran into and sank the "Valkyrie."

The entry of the "Satanita" for the regatta contained this clause: "I undertake that, while sailing under this entry, I will obey and be bound by the sailing rules of the Yacht Racing Association and the by-laws of the club."

Among the rules was the following: Rule 24: " . . . If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht . . . she shall forfeit all claim to the prize, and shall pay all damages."

LORD ESHER, M.R. This is an action by the owner of a yacht against the owner of another yacht, and, although brought in the Admiralty Division, the contention really is that the yacht which is sued has broken the rules which by her consent governed her sailing in a regatta in which she was contesting for a prize.

The first question raised is whether, supposing her to have broken a rule, she can be sued for that breach of the rules by the owner of the competing yacht which has been damaged; in other words, Was there any contract between the owners of those two yachts? Or it may be put thus: Did the owner of the yacht which is sued enter into any obligation to the owner of the other yacht, that if his yacht broke the rules, and thereby injured the other yacht, he would pay damages? It seems to me clear that he did; and the way that he has undertaken that obligation is this. A certain number of gentlemen formed themselves into a committee and proposed to give prizes for matches sailed between yachts at a certain place on a certain day, and they promulgated certain rules, and said: "If you want to sail in any of our matches for our prize, you cannot do so unless you submit yourselves to the conditions which we have thus laid down. And one of the conditions is, that if you do sail for one of such prizes you must enter into an obligation with the owners of the yachts who are competing, which they at the same time enter into similarly with you, that if by a breach of any of our rules you do damage or injury to the owner of a competing yacht, you shall be liable to make good the damage which you have so done." If that is so, then when they do sail, and not till then, that relation is immediately formed between the yacht owners. There are other conditions with regards to these matches which constitute a relation between each of the yacht owners who enters his yacht and sails it and the committee; but that does not in the least do away with what

the yacht owner has undertaken, namely, to enter into a relation with the other yacht owners, that relation containing an obligation.

Here the defendant, the owner of the "Satanita," entered into a relation with the plaintiff Lord Dunraven, when he sailed his yacht against Lord Dunraven's yacht, and that relation contained an obligation that if, by any breach of any of these rules, he did damage to the yacht of Lord Dunraven, he would have to pay the damages.[1]

Implied contract

EMMA RAYMOND *v.* CAROLINE E. SHELDON'S ESTATE

VERMONT SUPREME COURT, June 21, 1918

[*Reported in* 92 *Vermont,* 396]

MILES, J. The ground of exception to the refusal to direct a verdict in the defendant's favor is that there was no evidence in the case tending to prove a promise implied in fact on the part of Mrs. Sheldon. It is true as argued by the defendant, that the implied contract, such as here under consideration, must contain all the elements of an express contract, and that it only differs from an express contract in its proof. 6 R. C. L. 587, par. 6. Each depends upon questions of fact, and if there is any substantial evidence fairly and reasonably tending to establish such contract, that question must be submitted to the jury. Fitzsimons *v.* Richardson, 86 Vt. 229, 84 Atl. 811; McGaffey *v.* Mathie, 68 Vt. 403, 35 Atl. 334; Kelton *v.* Leonard, 54 Vt. 230.

In reviewing the denial of defendant's motion for a directed verdict, the evidence must be viewed in the light most favorable to the plaintiff. Hazen *v.* Rutland R. R., 89 Vt. 94, 94 Atl. 296. Applying these well-established rules to what appears in this case, we examine the evidence to see if it reasonably and fairly tends to show an implied promise on the part of Mrs. Sheldon to pay the plaintiff what her services were reasonably worth, and from that examination we think it does so show.

The evidence of one witness was to the effect that during the time covered by the plaintiff's bill against Mrs. Sheldon's estate, the witness had on frequent occasions received requests over the telephone from the Sheldon house, to ask the plaintiff to call there; that when the witness was at work for Mrs. Sheldon, the plaintiff would call there and Mrs. Sheldon would ask her on those occasions, why she, the plaintiff, had not called, stating to the plaintiff that she wanted her to do something for her; that she knew of the plaintiff's bringing to Mrs. Sheldon articles purchased at the store for

[1] The statement of the case is abbreviated, and only so much of Lord Esher's opinion is printed as relates to the question whether a contract had been made. Lopes, L. J., and Rigby, L. J., delivered concurring opinions. The judgment for the plaintiff was affirmed in Clarke *v.* Dunraven, [1897] A. C. 59. See also Vigo Agricultural Society *v.* Brumfiel, 102 Ind. 146.

her; that at one time Mrs. Sheldon said to the witness that she could not pay the plaintiff for what she had done for her. There was other similar evidence in the case which had a tendency to prove that the plaintiff's services were performed at the request of Mrs. Sheldon. This was enough to entitle the plaintiff to go to the jury if the services were valuable. It is said in 40 Cyc. 2810: "Where valuable services are rendered, or material furnished, by one person for another at the latter's request, in the absence of circumstances showing that the services or material were intended to be rendered or furnished gratuitously, the former is entitled to recover for such services or material, although there was no express contract for remuneration."

To the same effect is 6 R. C. L. 587, par. 6. Indeed such contracts are of daily occurrence, and no question is made as to their legal and binding force.

An examination of the transcript discloses that the evidence tended to show that the services were valuable; that the plaintff did washings weekly and special washings twice a year for Mrs. Sheldon; that the washings were not the general washings, but the washings of such things as Mrs. Sheldon's wearing apparel, her bureau covers, towels, napkins and blankets. There was no error in overruling the motion for a directed verdict.[1]

F. E. J. CANNEY, Appellant, *v.* THE SOUTHERN PACIFIC COAST RAILROAD COMPANY, Respondent

California Supreme Court, June 15, 1883

[*Reported in* 63 *California,* 501]

McKee, J. The action in this case was brought to recover the balance of an alleged indebtedness for services rendered by the plaintiff as a physician and surgeon, at the alleged special instance and request of the defendant. Part of the services, included in the statement of the cause of action, were rendered at the instance and request of the defendant and were paid. The contention is as to the services which were rendered to a number of persons who had been injured, on the 23d of May, 1880, by a railroad accident on the line of the defendant's road in the county of Santa Cruz. It is for these that the plaintiff seeks to make the defendant liable.

But at the trial, the plaintiff was sworn as a witness in his own behalf, and he testified as follows: "On the morning of the 24th of May, 1880, I was called by the wife of one of the persons injured to treat her husband, and on that day I was called by eleven of said injured parties to treat them. I attended upon them, in pursuance

[1] A portion of the opinion is omitted.

of my original calling, from that time until they were all recovered. My services were reasonably worth eleven thousand dollars." According to that testimony the services were rendered by the plaintiff upon an employment between him and the persons injured. That contract fixed the rights and liabilities of the parties to it. The persons, for whose benefit and at whose instance and request the services were rendered, were bound to pay for them. No other or different contract could be implied. Of course, the parties to the contract might have wholly freed themselves from their rights and liabilities under it by a discharge of the contract. A contract may be discharged or put an end to at any time, by mutual consent, or by an alteration in its terms which, in effect, substitutes for it a new arrangement between the parties themselves or between one of them and a third party. (§ 1531, Civ. Code.) And it is claimed that, while the plaintiff was engaged in performing the services under his original employment, the defendant informed the plaintiff that the injured were allowed to select any physician they saw proper, and defendant would be responsible for the indebtedness.

Yet, as a witness, the plaintiff admitted that no new promise about the services had been made to him. The only thing upon which he relies is, that the president of the railroad company "said to the injured parties," after they had employed the plaintiff, "that they should employ whatever physician they saw proper and the defendant would pay the bills." But that was not said to the plaintiff, nor was he present when it was said. It appears that the parties to whom it was said communicated it to the plaintiff; but neither the promise to them, nor the communication of that promise to the plaintiff constituted a contract between the defendant and the plaintiff either as accessory, or by way of novation, to his original employment which he was engaged in performing. The plaintiff had no communication from or with the defendant upon the subject; there was therefore no mutuality or consent between them, and in law, however it might be in morals, no liability attached to the defendant for the services of the plaintiff to the persons who employed him.

It is not necessary to decide whether the promise made by the president of the company to the wounded constituted a contract between them, collectively or individually, and the company, which might be enforced for the benefit of the plaintiff. No such claim seems to have been made or transferred by any of them to the plaintiff, nor is the plaintiff's cause of action founded upon such a claim. Trenor *v.* C. P. R. R. Company, 50 Cal. 222, is not applicable to the case in hand. That, it is true, was also a case for the services of a physician and surgeon rendered to persons wounded by a railroad accident; but there was, in the case, some evidence tending to show that the services were rendered at the instance and request of the defendant, and the case was decided upon a conflict of evidence. But in the case in hand there was no conflict of evidence. The

plaintiff in his testimony and on the trial, admitted, and his witnesses proved, that the services were rendered in pursuance of his original employment by those who were wounded and not otherwise. There was, therefore, no contract, express or implied, between the plaintiff and the defendant in relation to the services which are the subject of the suit, and as there is no prejudicial error in the record, the judgment and order are affirmed.

McKinstry, J., and Ross, J., concurred.

OIL WELL SUPPLY COMPANY *v.* GEORGE MacMURPHEY

Minnesota Supreme Court, December 6, 1912

[*Reported in* 119 *Minn.* 500]

Holt, J. The action is for a breach of an alleged agreement to honor a draft. The court directed a verdict for plaintiff, and defendant appeals from an order denying him a new trial.

These are the uncontroverted facts: One Hukill, residing and doing business at Pittsburgh, Pennsylvania, applied to plaintiff to cash or buy a sight draft for $300 drawn by Hukill, payable to his own order, upon defendant, a relative of Hukill residing at Ortonville, Minnesota. Plaintiff promised to do so if defendant, by telegram, would agree to accept the draft. Thereupon, on the same day, to wit, December 30, 1907, Hukill sent a telegram to defendant at Ortonville, reading: "Will you wire me that you will honor draft for $300?" The same day, in response to said message, defendant sent a telegram from Ortonville to E. M. Hukill at Pittsburgh, which reads: "I will." Hukill thereupon presented the draft and the two telegrams to plaintiff, which bought the draft, and in due course of business caused it to be presented to defendant for acceptance and payment. Defendant refused. When plaintiff learned this, it wrote defendant as follows:

"Oil Well Supply Co.,
"Pittsburgh, Pa.

"January 7, 1908.

"Subject E. M. Hukill draft.
"Mr. Geo. MacMurphey,
"Ortonville, Minn.

"Dear Sir:

"On December 31st, we cashed for Mr. E. M. Hukill a sight draft drawn on you for $300, which has been returned to us under protest, marked 'payment refused,' the fees amounting to $3.08. We advanced said money on the strength of the telegram from you to Mr. Hukill, dated December 30th, reading 'I will,' which he told us was in reply to a telegram sent to you by him on December 30th, reading, 'Will you wire me that you will honor draft for $300.' We would like to know at once your reason for not honoring the draft; also whether or not your telegram reading 'I will' was in answer to a telegram sent by Mr. Hukill to you as quoted above. Trusting to hear from you by return mail, and thanking you in advance,

"We remain

"Yours truly,
"Louis Brown, *Treas.*"

To this letter defendant appended this reply:

"LOUIS BROWN,
"DEAR SIR:

"I will say in reply to the above that my telegram 'I will,' was in answer to above telegram from Mr. Hukill on December 30th. I was out of funds myself and tendered a check from Mr. H. and it was not accepted, hence the protest. I presume this is all cleared up ere this.

"Yours truly,
"GEO. MACMURPHEY."

It seems to us that the two telegrams constitute a clear and definite contract on the part of defendant to honor a draft for $300. The manifest purpose of Hukill's telegram was to get defendant to agree to honor or accept a draft. It was not to ask for a telegram, except as a means of conveying an agreement or refusal to honor the proposed draft. There can be no doubt that plaintiff took the telegrams to be an agreement by defendant to honor the draft. Defendant appears to be an intelligent professional man, and it is safe to assume that he was not unacquainted with business methods. Hence he must have inferred from the telegram that Hukill wished to negotiate the draft on the strength of defendant's agreement to honor it. That defendant so understood the purport of the telegram admits of no doubt, when the subsequent correspondence between him and plaintiff is considered. In construing written contracts, the meaning of the language employed, taken in its ordinary and popular sense with reference to the matter in hand, controls unless, when so viewed, an ambiguity still remains. If there be uncertainty after thus examining the agreement, the situation of the parties and the circumstances surrounding the transaction may be considered, in order to arrive at the true and intended meaning of the ambiguous expressions used. However, we cannot find any ambiguity in the telegrams constituting the agreement here, when applied to the subject matter. In contracts made by telegrams, the fewest possible words are used, and often omitted words in a message are to be supplied from the sense or context of a message to which it is an answer. This is so usual an occurrence in the business world that courts must take notice of the fact. Upon the undisputed facts, plaintiff was entitled to recover, and the court rightly directed the verdict, unless there was error in excluding certain evidence offered by defendant.

The defendant offered to prove that long prior to December 30, 1907, he had been in the habit of honoring drafts made upon him by Hukill; that during such time defendant was in possession of valuable stock pledged by Hukill to secure defendant against loss from such acceptances; that prior to said date, after he had surrendered this stock, Hukill requested defendant to honor further drafts, whereupon defendant stated that he would not do so unless his, defendant's, financial condition at the bank at Ortonville was such that he could conveniently do so, and that Hukill should also again pledge with defendant the securities he before had; that he told

Hukill not to draw any drafts on the defendant, until he had first wired to determine whether defendant would honor them; and that no such telegram or request should be sent to defendant, unless Hukill should, at the same time, place the said securities with defendant. And further that, when defendant received the telegram and he answered the same, it was with the expectation that the security would be sent him; that such security was not sent, and defendant was in such financial condition in his accounts at the bank that he could not conveniently honor the draft. We fail to see how the proffered proof could affect the plaintiff which bought the draft on the strength of the telegrams. Defendant did not offer to show that plaintiff had any knowledge of either the first arrangement under which defendant honored Hukill's drafts or this last one.

The order must be affirmed.

B. F. STURTEVANT COMPANY, RESPONDENT,

v.

FIREPROOF FILM COMPANY, APPELLANT

NEW YORK COURT OF APPEALS, October 11–November 16, 1915

[*Reported in* 216 *New York,* 199]

SEABURY, J.[1] This action is brought to recover damages for the breach of an alleged contract. On December 29, 1911, the plaintiff submitted to the defendant in the form of a type-written letter "proposal and specifications" for a heating and ventilating plant; and in the same letter also quoted prices of certain apparatus. The letter was signed on behalf of the plaintiff by J. L. Williamson, and endorsed upon it is — "Accepted: The Fireproof Film Company. H. Kuhn, Vice-President & Treasurer. Date, December 30th, 1911." The plaintiff began the work on January 1st. 1912.

After some correspondence the defendant notified the plaintiff that it proposed to cancel the contract. Upon the trial the defendant set up lack of authority on the part of Mr. Kuhn, the officer who attempted to enter into the contract on its behalf. Satisfactory proof of his authority was, however, presented and the trial court submitted the question to the jury.

The defendant still adheres to the same contention, but the principal ground urged for the reversal of the judgment is that there was no contract between the parties because at the bottom of the first page of the plaintiff's office stationery, upon which the proposal was written, appear the words: "all agreements are contingent upon strikes, fire, accidents or delays beyond our control. All prices are

[1] The statement of facts in the opinion is abbreviated, and a portion of the opinion omitted.

subject to change without notice, and all contracts and orders taken are subject to the approval of the executive office at Hyde Park, Mass." These sentences are printed in very small type and the first typewritten numeral that indicates the page number is typewritten over this printed matter. The appellant claims that the proposal was given "subject to the approval of the executive office at Hyde Park, Mass.," and that as there was no proof that this approval was given and communicated to it, there was no contract. It appears clearly that Williamson had authority to make the contract and that his action in so doing was ratified by the executive office of the plaintiff at Hyde Park, Mass. The plaintiff actually commenced to perform the work and continued working under the contract until it received the notice of the defendant that it had canceled the contract. The point now earnestly insisted upon was not litigated upon the trial and seems to be an afterthought that occurred to the defendant when it failed to defeat the plaintiff's claim on the ground that its vice-president and treasurer, Kuhn, was not authorized to make the contract in its behalf. The claim that is now urged rests entirely upon the contention that the clause "all contracts or orders taken are subject to the approval of the executive office at Hyde Park, Mass.," is to be deemed a part of the proposal. If this provision was a part of the proposal, there could be no proof of a contract in the absence of evidence that the order was approved and that the defendant had been notified of that fact. In view of the manner in which this provision is printed upon the stationery of the plaintiff it cannot be held, as a matter of law, that it was incorporated in and a part of the proposal. The language of the proposal is clear and explicit, and this provision, which is printed in small type, cannot be allowed to change, alter or modify it, unless it was a part of the proposal. It was not incorporated in the body of the proposal or referred to in it. No suggestion was made, either in the pleadings or the proof, that it was a part of the proposal. If an issue had been raised upon the trial, whether it was a part of the proposal that issue would have presented a question of fact to be determined by the jury. As no such question was raised upon the trial, and as it does not appear from an inspection of the proposal that this provision was a part of it, the defendant is not now in a position to secure the reversal of this judgment upon this ground. When an offer, proposal or contract is expressed in clear and explicit terms, matter printed in small type at the top or bottom of the office stationery of the writer, where it is not easily seen, which is not in the body of the instrument or referred to therein, is not necessarily to be considered as a part of such offer, proposal or contract. In Sturm *v.* Boker (150 U. S. 312, 327) it was said that "The contract being clearly expressed in writing, the printed billhead of the invoice can, upon no well settled rule, control, modify, or alter it." In Summers *v.* Hubbard & Co. (153 Ill. 102, 109) the court said:

"The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter-heads would not have the effect of preventing appellants from entering into an unconditional contract of sale." In Menz Lumber Company *v.* McNeeley & Company (58 Wash. 223, 229), it was said that "The printed matter on the letter-heads was not referred to in either the order or the acceptance, and is not a part of the contract. . . . The construction contended for by the respondent would make that which is an absolute, unqualified acceptance upon its face, a conditional one by reference to a letter-head which was not referred to by either parties.

The other grounds upon which the appellant asks a reversal of the judgment are not such as to warrant discussion.

I advise that the judgment be affirmed, with costs.

CUDDERBACK, CARDOZO and POUND, JJ., concur; COLLIN, J., concurs in result; WILLARD BARTLETT, Ch. J., and CHASE, J., dissent.

Judgment affirmed.

ROBERT A. CHESEBROUGH, RESPONDENT, *v.* WESTERN UNION TELEGRAPH COMPANY, APPELLANT

NEW YORK SUPREME COURT, APPELLATE TERM, May, 1912

[*Reported in* 76 *New York Miscellaneous* 516]

SEABURY, J. This is an action to recover damages alleged to have been sustained by the plaintiff in consequence of the delayed delivery of a telegraph message. The facts are conceded. On September 12, 1910, the plaintiff, who was residing in Allenhurst, N. J., by letter instructed one Bayne, a broker, to purchase 2,000 bags of coffee for August delivery at eight and fifty-three one hundredths cents per pound. The letter was received by Bayne during the forenoon of September 13, 1910. Bayne attempted to purchase the coffee at eight and fifty-three one hundredths cents per pound during the forenoon of September 13th, but was unable to purchase at this price, as the market had advanced. At about noon of that day Bayne did purchase the required amount of coffee at eight and fifty-four one hundredths cents per pound. Upon completing this purchase Bayne delivered the following message to the defendant for transmission to the plaintiff:

"To ROBT. A. CHESEBROUGH,
"218 Elberon Ave.,
Allenhurst, N. J.:

"Letter just received bought two thousand August eight fifty four subject your approval eight fifty five now bid must have immediate reply by wire.
"Rush. C. E. BAYNE."

This message was received at Allenhurst a little before one P.M. on September thirteenth. It was not sent to the plaintiff's

residence, and was not delivered until two fifty P.M. on that day at the defendant's office at Allenhurst. Immediately upon its receipt the plaintiff wired the following reply to Bayne:

"Telegram just received. Purchase approved at eight fifty four."

This message was received by Bayne at his office at three forty P.M. It was stipulated upon the trial that the time consumed, about fifty minutes, in transmitting and delivering plaintiff's reply "was the requisite length of time for the transmission and delivery of said message." At the time of the receipt of the last message, the coffee exchange had closed, and it was impossible to purchase coffee at less than eight and eighty one hundredths cents per pound. The market price of August coffee was not less than eight and eighty one hundredths cents per pound at any time on September fourteenth, fifteenth and sixteenth, and up to the time that the plaintiff actually purchased another lot of 2,000 bags of August coffee at eight and eighty one hundredths cents per pound on September fourteenth.

It is claimed that, by reason of the defendant's delay in transmitting the message on September thirteenth from Bayne to the plaintiff, the plaintiff lost the benefit of the purchase which Bayne had made subject to the approval of the plaintiff, and that his loss is the difference between eight and fifty-four one hundredths cents per pound and eight and eighty one hundredths cents per pound, or $676, which, with interest, is the amount for which the plaintiff recovered judgment. Upon this appeal, the defendant makes no claim that the contract, in pursuance of which the message was received by it for transmission, relieved it of liability. The claim upon which the appellant now relies is, that the plaintiff suffered no loss, because, at the instant the plaintiff filed his message of acceptance, he became, as against Bayne, the owner of 2,000 bags of August coffee which had been purchased for his account by Bayne.

It is necessary, therefore, to determine as to whether, as between the plaintiff and Bayne, the plaintiff lost his right to have the purchase treated as having been made for his benefit. If he did not, he sustained no loss, and has no cause of action against this defendant. If Bayne, the broker, was within his rights in treating the purchase as made for his own account, in view of the delay, then the plaintiff has a cause of action against this defendant. Bayne selected the telegraph as a means of communicating his offer to the plaintiff. Under the offer, the broker was obliged to hold the coffee purchased for the account of the customer, if the latter, immediately on receipt of the offer, wired his acceptance. This the customer did. As soon as he sent the message accepting the broker's offer, the contract between the customer and the broker was complete, and the coffee purchased was the property of the plaintiff. The fact that, owing to the delay in the delivering of the broker's message, the customer's reply was not received until several hours

later than the broker anticipated that he would receive a reply, does not affect the legal relations existing between the customer and the broker. The offer contained in the broker's message manifested a willingness on his part to contract, and, in the absence of any limitation being prescribed, this willingness is presumed to continue until revoked. The customer accepted the offer before it was revoked when he sent the telegram accepting the offer. The instant that this was done, the contract was complete, and, under the contract then made, the coffee which the broker had purchased became the property of the customer. The general principle here applied is so well settled, and has been so frequently commented upon, that it is needless to do more than cite some of the cases which show its origin, development and application. Adams *v.* Lindsell, 1 Barn. & Ald. 681; Dunlop *v.* Higgins, 12 Jur. 292; Household Fire Ins. Co. *v.* Grant, L. R. 4 Exch. 216; Mactier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp, 11 N. Y. 441; Trevor *v.* Wood, 36 id. 307; Watson *v.* Russell, 149 id. 391; United Merchants Realty & Imp. Co. *v.* Roth, 193 id. 581. Nor is the theory at all tenable that the offer of the broker was to be considered by the customer as continuing, only in the event of its prompt delivery. In Trevor *v.* Wood, *supra,* the court said: "I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication, the parties mutually assume its hazards, which are principally as to the prompt receipt of the dispatches."

As between the plaintiff and Bayne, the coffee purchased by the latter became, by virtue of the plaintiff's prompt acceptance of the offer of the broker, the property of the plaintiff. Such being the case, it is plain that the plaintiff has no cause of action against this defendant. If the broker deprived the plaintiff of the coffee purchased, then the plaintiff has a cause of action against him, and if the broker sustained a loss he has a cause of action against this defendant. I can see no basis or legal theory upon which the plaintiff can assert a claim against this defendant.

It follows that the judgment should be reversed, with costs to the appellant, and the complaint dismissed with costs.[1]

[1] The decision was affirmed in 157 N. Y. App. D. 914.

B. — Duration and Termination of Offers

THE BOSTON AND MAINE RAILROAD *v.* JOSEPH H. BARTLETT and Another

Supreme Judicial Court of Massachusetts, March Term, 1849

[*Reported in* 3 *Cushing,* 224]

This was a bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants, on the 1st of April, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing, dated April 1st, 1844," whereby they agree to convey to the plaintiffs "the said lot of land for the sum of twenty thousand dollars, if the said corporation would take the same within thirty days from that date;" that afterwards, and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," &c., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on the 29th of May, 1844, while the extended contract was in full force and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

J. P. Healy, for the defendants.

G. Minot (with whom was *R. Choate*), for the plaintiffs.

Healy, in reply, said that in all the cases cited for the plaintiffs except the last, there was a consideration.

Fletcher, J. In support of the demurrer in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the Court, no importance is attached to the consideration set out in the bill; namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their

agreement was not binding because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the court in Maine in the case of Bean *v.* Burbank, 4 Shepl. 458, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet, while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration; and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity that person who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text books. The case of Cooke *v.* Oxley, 3 Term Rep. 653, in which a different doctrine was held, has occasioned considerable discussion, and, in one or two instances, has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has cer-

tainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore, in the present case, the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.

WILLIAM LORING AND ANOTHER v. CITY OF BOSTON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March Term, 1844

[*Reported in 7 Metcalf,* 409]

ASSUMPSIT to recover a reward of $1000, offered by the defendants for the apprehension and conviction of incendiaries. Writ dated September 30th, 1841.

At the trial before Wilde, J., the following facts were proved: On the 26th of May, 1837, this advertisement was published in the daily papers in Boston: "$500 reward. The above reward is offered for the apprehension and conviction of any person who shall set fire to any building within the limits of the city. May 26, 1837. Samuel A. Eliot, Mayor." On the 27th of May, 1837, the following advertisement was published in the same papers: "$1000 reward. The frequent and successful repetition of incendiary attempts renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions, the reward heretofore offered is doubled. One thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices. May 27, 1837. Samuel A. Eliot, Mayor." These advertisements were continued in the papers but about a week; but there was no vote of the city government, or notice by the mayor, revoking the advertisements, or limiting the time during which they should be in force. Similar rewards for the detection of incendiaries had been before offered, and paid on the conviction of the offenders; and at the time of the trial of this case, a similar reward was daily published in the newspapers.

In January, 1841, there was an extensive fire on Washington Street, when the Amory House (so called) and several others were burnt. The plaintiffs suspected that Samuel Marriott, who then boarded in Boston, was concerned in burning said buildings. Soon after the fire said Marriot departed for New York. The plaintiffs declared to several persons their intention to pursue him and prosecute him, with the intention of gaining the reward of $1000 which had been offered as aforesaid. They pursued said Marriott to New York, carried with them a person to identify him, arrested him, and brought him back to Boston. They then complained of him to the

county attorney, obtained other witnesses, procured him to be indicted and prosecuted for setting fire to the said Amory House. And at the March Term, 1841, of the Municipal Court, on the apprehension and prosecution of said Marriott, and on the evidence given and procured by the plaintiffs, he was convicted of setting fire to said house, and sentenced to ten years' confinement in the State Prison.

William Barnicoat, called as a witness by the defendants, testified that he was chief engineer of the fire department in Boston, in 1837, and for several years after; that alarms of fire were frequent before the said advertisement in May, 1837; but that from that time till the close of the year 1841, there were but few fires in the city.

As the only question in the case was, whether said offer of reward continued to be in force when the Amory House was burnt, the case was taken from the jury by consent of the parties, under an agreement that the defendants should be defaulted, or the plaintiffs become nonsuit, as the full Court should decide.

Peabody & J. P. Rogers, for the plaintiffs.

J. Pickering (City Solicitor), for the defendants.

Shaw, C. J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal, on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract made on good consideration, which the law will enforce.[1] That this principle applies to the offer of a reward to the public at large was settled in this Commonwealth in Symmes *v.* Frazier, 6 Mass. 344; and it has been frequently acted upon, and was recognized in the late case of Wentworth *v.* Day, 3 Met. 352.

The ground of defence is, that the advertisement, offering the reward of $1000 for the detection and conviction of persons setting fire to buildings in the city, was issued almost four years before the time at which the plaintiffs arrested Marriott and prosecuted him to conviction; that this reward was so offered in reference to a special emergency in consequence of several alarming fires; that the advertisement was withdrawn and discontinued; that the recollection of it had passed away; that it was obsolete, and by most persons forgotten; and that it could not be regarded as a perpetually continuing offer on the part of the city.

[1] "The offer of a reward or compensation, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Of course, until the performance, the offer of a reward is a proposal merely, and not a contract, and therefore may be revoked at the pleasure of him who made it." Shaw, C. J., Freeman *v.* City of Boston, 5 Met. 56, 57.

We are then first to look at the terms of the advertisement, to see what the offer was. It is competent to the party offering such reward to propose his own terms; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published May 26th, 1837, offering a reward of $500; and another on the day following, increasing it to $1000. No time is inserted in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place, it is to be considered that this is not an ordinance of the city government, of standing force and effect; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think, that it could not have been intended to be perpetual, or to last ten or twenty years or more; and therefore must have been understood to have some limit. It was insisted, in the argument, that it had no limit but the Statute of Limitations. But it is obvious that the Statute of Limitations would not operate so as to make six years from the date of the offer a bar. The offer of a reward is a proposal made by one party, and does not become a contract until acted upon by the performance of the service by the other, which is the acceptance of such offer, and constitutes the agreement of minds essential to a contract. The six years, therefore, would begin to run only from the time of the service performed and the cause of action accrued, which might be ten, or twenty, or fifty years from the time of the offer, and would in fact leave the offer unlimited by time.

Supposing, then, that by fair implication there must be some limit to this offer, and there being no limit in terms, then by a general rule of law it must be limited to a *reasonable time;* that is, the service must be done within a reasonable time after the offer is made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen, and citizens generally, to the detection and punishment of offenders. Possibly, too, it may operate to prevent offences, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public are awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects, such offer of a reward must be notorious, known and kept in mind by the public at large; and for that purpose the publication of the offer, if not actually continued in newspapers, and placarded at conspicuous

places, must have been recent. After the lapse of years, and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and, if known at all, known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit then from such a promise of reward must in a great measure have ceased. Indeed, every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance (perhaps a slight one) is that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve; though it tends to mark the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency has passed for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards.

But it is not necessary, perhaps not proper, to undertake to fix a precise time as reasonable time; it must depend on many circumstances. It is somewhat analogous to the case of notes payable on demand, where the question formerly was, within what time such note must be presented, and, in case of dishonor, notice be given, in order to charge the indorser. In the earliest reported case on the subject (Field *v.* Nickerson, 13 Mass. 131), the Court went no farther than to decide that eight months was not a reasonable time for that purpose.

Under the circumstances of the present case, the Court are of the opinion that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. In that length of time, the exigency under which it was made having passed, it must be presumed to have been forgotten by most of the officers and citizens of the community, and cannot be presumed to have been before the public as an actuating motive to vigilance and exertion on this subject; nor could it justly and reasonably have been so understood by the plaintiffs. We are therefore of opinion that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon

which this action, founded on an alleged express promise, can be maintained. *Plaintiffs nonsuit.*[1]

AVERILL and Another *v.* HEDGE

Supreme Court of Errors of Connecticut, June, 1838

[*Reported in* 12 *Connecticut Reports,* 424]

This was an action of assumpsit, alleging that the defendant, who conducted business at Wareham, Mass., under the name of the "Washington Iron Company," promised to deliver to the plaintiffs a quantity of rods, shapes, and band-iron, in March, 1836.

The cause was tried at Hartford, February Term, 1838, before Williams, C. J.

The plaintiffs claimed to have proved their case by a correspondence between the parties in the year 1836; particularly by a letter from the plaintiffs to the defendant, dated the 29th of February; the defendant's answer of the 2d of March; a letter from the plaintiffs, dated the 14th of March; and the answer of the defendant, also dated the 14th of March by mistake, in fact written the 16th of March; and the plaintiffs' reply thereto dated the 19th of March. The whole correspondence between the parties was read in evidence; the substance of which was as follows:—

Hartford, 29th February, 1836. Dear Sir, — Regarding the future disposal of your nails as settled, it would be improper to importune you further on that point. Perhaps, however, you will not object to sending us a supply of rods and shapes for our spring sales. Please to say on what terms you will send us ten or fifteen tons, assorted, by first packet in the spring. We shall also be glad to purchase our hollow ware of you on the same terms as heretofore. Shall be pleased to hear from you soon. [Signed, "J. & H. Averill," the plaintiffs; and addressed to John Thomas, Esq.]

Wareham, 2d March, 1836. On the writer's return from the South last evening, he found your favor of the 29th ult., to which we now reply. We will deliver to you in Hartford ten or fifteen tons of rods, shapes, and band-iron, as follows: say — shapes and band-iron, at $110 per gross ton, six months; and old sable rods, at $116, six months. Old sable iron is now quick at $110 per ton in Boston; and there is but very little iron there at any price. We will deliver you at Hartford a common assortment of hollow ware, at $28 per ton, six months. [Signed "Washington Iron Company, per John Thomas, Agent;" and addressed to the plaintiffs.]

Hartford, 14 March, 1836. Dear Sir, — We have bought of Ripley & Averill their stock of hollow ware, with the understanding that we were to receive the benefit of their orders given you last July. The balance of this order we believe was in readiness last fall; but, owing to the early closing of our navigation, was not shipped. Will you ship us this lot of ware by first packet, on terms then agreed on with R. & A.? Please advise us by return mail if we may expect it. [Signed by plaintiffs, and addressed to John Thomas, Esq.

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[1] In Drummond *v.* United States, 35 Ct. Cl. 356, it was held that a right to a reward offered for the arrest of a criminal was gained by making the arrest ten years after the offer was made, the criminal being still a fugitive from justice.

In Mitchell *v.* Abbott 86 Me. 338, it was held that a lapse of twelve years between the time when the reward has offered and the time of performance was more than a reasonable time.

In the matter of Keily, 39 Conn. 159, it was held that an offer of reward for a particular crime would not lapse until the Statute of Limitations barred conviction for the crime. See also Shaub *v.* Lancaster, 156 Pa. 362.

WAREHAM, March 14, 1836. DEAR SIRS, — Your favor of the 14th inst. is at hand, and contents noted. We shall most cheerfully comply with your request to ship to you the balance of Ripley & Averill's order of hardware, not filled in consequence of the early frost last autumn; such being the understanding between yourselves and Mr. Ripley. We learn from our neighbors, engaged in the manufacture of this article, that they now hold it at $30 per ton, and shall not sell it at a less price through the season; and consequently we shall not consider ourselves holden to the offer made to you on the 2d inst., unless you signify your acceptance thereof by return mail, but shall furnish the balance of Ripley & Averill's order in conformity with the contracts made with them.

Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you? [Signed, "WASHINGTON IRON COMPANY, per JOHN THOMAS, Agent;" and addressed to the plaintiffs.]

HARTFORD, March 19th, 1836. DEAR SIR, — Your favor of the 17th came to hand last evening, too late to be answered before this morning. We note and duly appreciate your prompt assent to send us the balance of R. & A.'s order for hollow ware, at old prices. In our future purchases of that article, we will buy of you at $28 per ton, six months, as offered in your favor of the 2d. We will also take the following shapes, &c., on your terms there given: 160 bundles of new sable or Swedes, different shapes, specified; also 40 bundles smaller shapes, to be of old sable, assorted; 120 bundles band-iron, assorted; 60 bundles half-inch spike rods; 200 bundles P S I horse-nail rods, or a ton, if convenient, in 28 lb.bundles, sending 5 tons in all. [Signed by the plaintiffs, and addressed to JOHN THOMAS, Esq.

In a letter dated March 21st, 1836, addressed to John Thomas, Esq., the plaintiffs alter their order for band-iron, varying the sorts.

The letter written by the defendant on the 16th of March, dated 14th, arrived at Hartford on the 18th of March, about 2 o'clock P.M. The plaintiff's answer to the letter, dated the 19th of March, was post-marked the 20th, and the letter written by the plaintiffs on the 21st of March was post-marked on the day of its date; and both letters arrived at Wareham together on the 23d of March.

The defendant introduced a witness to prove that letters mailed at Hartford for Wareham were, by the usual course of mail, sent by Providence, and would reach that place on the evening of the day after leaving Hartford, — but might be sent by Boston; although, when sent by Boston, on the days that both mails went, a letter would be one day longer in reaching Wareham; that a mail was sent every day from Hartford to Boston, and every day but Sunday from Hartford to Providence; that the Providence mail usually left the post-office in Hartford about 5 o'clock every morning, except Sunday, when no mail was sent, and Monday, when it left about 10 o'clock A.M. The mails were, in the course of business, closed one hour before they left the office. Upon the 19th of March, 1836, the Providence mail left the office at 25 minutes past 5 o'clock in the morning, and on the 21st at 6 minutes past ten in the morning. The 20th was Sunday; and letters put into the office on Saturday evening and on Sunday evening would be forwarded by the same mail. The usual course of business at the post-office in Hartford was to stamp or post-mark all letters, not on the day they were forwarded, but the day they were received into the office, — unless received after 9 o'clock in the evening, when they were post-marked as of the succeeding day.

The court instructed the jury that if the letter dated March 19th

was mailed on the 20th of March it was not a seasonable acceptance. On verdict for the defendant, the plaintiffs moved for a new trial.

Hungerford, in support of the motion.

T. C. Perkins, contra.

BISSELL, J.[1] The great question in the case is, whether there has been such an acceptance of the defendant's offer as that he is bound by it.

The jury were instructed that if the letter written by the plaintiffs, accepting the proposal of the defendant, was not delivered into the post-office at Hartford until the 20th of March, it was not sent in such reasonable time as to make their acceptance obligatory on the defendant.

Several questions, not immediately growing out of the charge, but which, if decided in favor of the defendant, make an end of the case, have been much discussed at the bar.

1. It has been contended that the proposal of the defendant, in his letter of the 2d, was not renewed by his letter of the 16th of March. Upon this point no opinion was given by the judge on the circuit, unless an opinion may be inferred from the ground on which he rested the case in his instructions to the jury. Nor is it essential that a decided opinion on the question should be expressed by this Court; because there are other grounds on which we are unanimously of opinion that the ruling of the judge below must be sustained.

Were this, however, a turning point in the case, we should probably be prepared to say that the defendant's letter of the 16th of March does contain a distinct renewal of his former proposal. His language is certainly very strong to show that such was his intention. He says: "Do you accept of our proposal for supplying you with rods, shapes, and band-iron; and if so, what quantity of each shall we send you?" Now we cannot but think that the fair and obvious construction of this language is that the defendant then stood ready to supply the articles upon the terms already specified. And such appears to have been his own view of the case, as is manifest from his subsequent letter of the 8th of April.

2. It has been urged, that admitting this letter to contain a renewal of the former proposal, yet, *by the terms of it,* the plaintiffs were bound to signify their acceptance by return of mail. The question, in this aspect of it, is manifestly independent of any mercantile usage. That the defendant had a right to attach this condition to his offer is undeniable. The question is, whether he has done so; and whether such is the true construction of his letter.

In his letter of the 2d of March, the defendant had offered to supply the plaintiffs an assortment of hollow ware at certain prices; and in regard to this offer, in his letter of the 16th, he says: "We shall not consider ourselves holden to the offer made you on the 2d inst., unless you signify your acceptance thereof by return of mail;" and he

[1] A portion of the opinion is omitted.

then puts the inquiry with regard to rods, shapes, and band-iron, that has been already mentioned. Now, it should be borne in mind, that the defendant's proposal, in regard to these articles, had already been before the plaintiffs for at least ten or twelve days; and one claim put forth by them on the trial was, that during the month of March the price of these articles was constantly advancing in the market. The question then arises, whether under these circumstances it was the intention of the defendant to give them further time; and whether such intention can be fairly inferred from the language of his communication. In regard to the hollow ware, there can be no question. The plaintiffs were positively required to signify their acceptance by return mail. And when, in the same letter and under similar circumstances, they are also required to decide upon the proposal in regard to the rods, &c., it is certainly not easy to see why the defendant should have made, or should have intended to make, a distinction between these classes of articles. Had the judge directed the jury that the defendant was not bound, unless the plaintiffs signified their acceptance by return of mail, we are by no means satisfied that the direction would have been wrong. As, however, he placed the case on grounds more favorable to the plaintiff's claim, a decision upon this point is unnecessary. Any further discussion of it is therefore waived.

3. We come then to the inquiry, whether the instruction actually given to the jury is correct in point of law. And here it may be remarked, that it is very immaterial when the letter of the plaintiffs was *written:* until *sent,* it was entirely in their power and under their control, and was no more an acceptance of the defendant's offer than a bare determination, locked up in their own bosoms and uncommunicated, would have been. And it surely will not be claimed that mere volitions, a mere determination to accept a proposal, constitute a contract. The plaintiffs then did not accept the defendant's proposition until the 20th, and for aught that appears [not] until the evening of that day. That they were bound to accept within a reasonable time was distinctly admitted in the argument; and if not admitted, the position is undeniable. The case of the plaintiffs then comes to this, and this is the precise ground of their claim: That they had a right to hold the defendant's offer under advisement for more than forty-eight hours, and to await the arrival of three mails from New York, advising them of the state of the commodity in the market; and having then determined to accept, the defendant was bound by his offer; and that this constitutes a valid mercantile contract. Now, in regard to such a claim, we can only say, that it appears to us to be in the highest degree unreasonable; and that we know of no principle, of no authority, from which it derives the slightest support.

Indeed, it seems to us to be subversive of the whole law of contracts. For it is most obvious that, if during the interval the defendant

was bound by his offer, there was an entire want of mutuality: the one party was bound, while the other was not. Had the proposition been made at a personal interview between the parties, there can be no pretence that it would have bound the defendant beyond the termination of the interview.

In Mactier *v.* Frith, 6 Wend. 103, which goes as far as any case on the subject, the rule is laid down, that the offer continues until the letter containing it is received, and the party has had a fair opportunity to answer it. And it is further said, that a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An offer then, made through a letter, is not continued beyond the time that the party has a "fair opportunity" to answer it. This is substantially the doctrine of the charge. And it is not only highly reasonable, but is supported by all the analogies of the law. Once establish the principle that a party to whom an offer is made may hold it under consideration more than forty-eight hours, watching in the mean time the fluctuations of the market, and then bind the other party by his acceptance, and it is believed that you create a shock throughout the commercial community, utterly destructive of all mercantile confidence. No offers would be made by letter. It would be unsafe to make them.

It is only necessary to apply these principles to the case before us and their application is exceedingly obvious. The proposal of the defendant, which had already been several days before the plaintiffs, was renewed early on the afternoon of the 18th. They show no act done by them signifying their acceptance, until the evening of the 20th. Was this within a reasonable time? Was this the first fair opportunity of manifesting their acceptance? We think this can hardly be claimed. Had the defendant had an agent in Hartford, through whom the offer was made, might the plaintiffs thus have delayed the communication of their acceptance to him? This would not be pretended. And can it vary the principle, that the offer, instead of being thus made, was made through the agency of the post-office? Had the offer of the defendant been promptly accepted, information of the acceptance would have reached the defendant on the evening of the 20th, in due course of mail. He waited until the 22d; and hearing nothing from the plaintiffs, he then virtually retracted his offer, by making such arrangements as made it impossible for him to fill their order. We think he was fully justified in so doing; and that upon every sound principle the rule in this case must be discharged.

In this opinion the other Judges concurred.

New trial not to be granted.[1]

[1] In Kempner *v.* Cohn, 47 Ark. 519, it was held that in the case of an offer to sell real estate, a delay of five days in accepting was not as matter of law unreasonable. In Ortman *v.* Weaver, 11 Fed. Rep. 358, a delay of two weeks in accepting such an offer was held unreasonable. In Hargadine, McKittrick Co. *v.* Reynolds, 64 Fed. Rep. 560, a delay of six days in accepting an offer to sell cotton manufactured goods was

BYRNE & CO. *v.* LEON VAN TIENHOVEN & CO.

In the Common Pleas Division, March 6, 1880

[*Reported in* 5 *Common Pleas Division,* 344]

Lindley, J.[1] This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates pursuant to an alleged contract.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The defendants by letter of October 1 offered the plaintiffs 1000 boxes of tinplates at 15*s.* 6*d.* a box "subject to your cable on or before the 15th inst. here." The plaintiffs sent a telegram on October 11th accepting this offer, and confirmed it by letter dated October 15th. On October 8th the defendants wrote a letter withdrawing their offer. This letter reached the plaintiffs on October 20th, but they claimed the revocation was ineffectual and brought this action.

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. Routledge *v.* Grant, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in

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held unreasonable. In Minnesota Oil Co. *v.* Collier Lead Co., 4 Dill. 431, it was held that in the case of an offer by telegram to sell oil, then the subject of rapid fluctuation in price, a telegraphic reply after twenty-four hours' delay was too late.

See also Ramsgate Hotel Co. *v.* Montefiore, L. R. 1 Ex. 109; *Re* Bowron, L. R. 5 Eq. 428 L. R. 3 Ch. 592; De Witt *v.* Chicago, &c. Ry. Co., 41 Fed. Rep. 484; Ferrier *v.* Storer, 63 Ia. 484; Tromstine *v.* Sellers, 35 Kan. 447; Park *v.* Whitney, 148 Mass. 278; Stone *v.* Harmon, 31 Minn. 512; Hallock *v.* Insurance Co., 2 Dutch, 268; Mizell *v.* Burnett, 4 Jones, L. 249; Baker *v.* Holt, 56 Wis. 100; Sherley *v.* Peehl, 84 Wis. 46.

[1] A brief statement of facts has been substituted for the statement of the court. Only so much of the opinion is given as relates to the question of revocation.

point of law no revocation at all. This is the view taken in the United States: see Tayloe *v.* Merchants Fire Insurance Co., 9 How. Sup. Ct. Rep. 390, cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted: Harris' Case, Law Rep. 7 Ch. 587; Dunlop *v.* Higgins, 1 H. L. 381, even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiffs on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon

the footing that the offer and acceptance constitute a contract binding on both parties.[1]

HYDE *v.* WRENCH

In Chancery, December 8, 1840

[*Reported in* 3 *Beavan,* 334]

This case came on upon general demurrer to a bill for specific performance, which stated to the effect following: —

The defendant, being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for 1,200*l.*, which the plaintiff, by his agent, declined; and on the 6th of June the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me 1,200*l.* for my farm; I will only make one more offer, which I shall not alter from; that is, 1,000*l.* lodged in the bank until Michaelmas, when title shall be made clear of expenses, land, tax, &c. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant 950*l.* for the purchase of the farm, but the defendant wished to have a few days to consider.

On the 11th of June, the defendant wrote to the plaintiff's agent as follows: "I have written to my tenant for an answer to certain inquiries, and, the instant I receive his reply, will communicate with you, and endeavor to conclude the prospective purchase of my farm. I assure you I am not treating with any other person about said purchase."

The defendant afterwards promised he would give an answer about accepting the 950*l.* for the purchase on the 26th of June; and on the 27th he wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at Luddenham at present.

This letter being received on the 29th of June, the plaintiff's agent on that day wrote to the defendant as follows: "I beg to acknowledge

[1] Stevenson *v.* McLean, 5 Q. B. D. 346; Henthorn *v.* Fraser, [1892] 2 Ch. 27; *Re* London & Northern Bank, [1900] 1 Ch. 220; Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390; Patrick *v.* Bowman, 149 U. S. 411, 424; The Palo Alto, 2 Ware, 343; Kempner *v.* Cohn, 47 Ark. 519; Sherwin *v.* Nat. Cash Register Co., 5 Col. App. 162; Wheat *v.* Cross, 31 Md. 99; Brauer *v.* Shaw, 168 Mass. 198, *acc.* The contrary implications in Cooke *v.* Oxley, 3 T. R. 653; Adams *v.* Lindsell, 1 B. & Ald. 681; Head *v.* Diggon, 3 Man. & R. 97; Hebb's Case, L. R. 4 Eq. 9, must be regarded as overruled.

In Patrick *v.* Bowman, 149 U. S. 411, the Court, after holding that a revocation of an offer was ineffectual if not received before acceptance, said (at p. 424): "There is indeed, in a case of this kind, some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act."

the receipt of your letter of the 27th instant, informing me that you are not disposed to accept the sum of 950*l.* for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm; viz., 1,000*l.* through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay, as to the title, for the reason which I mentioned to you."

The bill stated, that the defendant "returned a verbal answer to the last-mentioned letter, to the effect he would see his solicitor thereon;" and it charged that the defendant's offer for sale had not been withdrawn previous to its acceptance.

To this bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer.

Mr. Kindersley and *Mr. Keene,* in support of the demurrer. To constitute a valid agreement there must be acceptance of the terms proposed. Holland *v.* Eyre.[1] The plaintiff, instead of accepting the alleged proposal for sale for 1,000*l.* on the 6th of June, rejected it, and made a counter proposal; this put an end to the defendant's offer, and left the proposal of the plaintiff alone under discussion; that has never been accepted, and the plaintiff could not, without the concurrence of the defendant, revive the defendant's original proposal.

Mr. Pemberton and *Mr. Freeling,* contra. So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it; the bill charges that the defendant's offer had not been withdrawn previous to its acceptance by the plaintiff; there therefore exists a valid subsisting contract. Kennedy *v.* Lee,[2] Johnson *v.* King,[3] were cited.

The Master *of the* Rolls

Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for 1,000*l.*, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own to purchase the property for 950*l.*, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it;[4] and that therefore there exists no obligation of any sort between the parties; the demurrer must be allowed.[5]

[1] 2 Sim. & St. 194.
[2] 3 Mer. 454.
[3] 2 Bing. 270.
[4] Lord Langdale. — Ed.
[5] National Bank *v.* Hall, 101 U. S. 43, 50; Minneapolis, &c. Ry. Co. *v.* Columbus Rolling Mills, 119 U. S. 149; Ortman *v.* Weaver, 11 Fed. Rep. 358; W. & H. M. Goulding Co. *v.* Hammond, 54 Fed. Rep. 639 (C. C. A.); Baker *v.* Johnson Co., 37 Ia. 186, 189; Cartmel *v.* Newton, 79 Ind. 1, 8; Fox *v.* Turner, 1 Ill. App. 153; Egger *v.* Nesbit, 122 Mo. 667; Harris *v.* Scott, 67 N. H. 437; Russell *v.* Falls Mfg. Co., 106 Wis. 329, *acc.* See further 1 Williston, Contracts, § 51.

FRANZ POEL, *et al.*, Respondents, *v.* BRUNSWICK-BALKE-COLLENDER COMPANY OF NEW YORK, Appellant

New York Court of Appeals, October 22–November 23, 1915

[*Reported in* 216 *New York,* 310]

Seabury, J.[1] In pursuance of a conversation by telephone, correspondence ensued between the parties culminating in a letter of April 4th, 1910, from the plaintiff, enclosing a draft contract for about twelve tons of Upriver fine Para rubber at $2.42 a pound, in equal monthly shipments from January to June, 1911. In reply to this offer the defendant on April 6th, 1910, sent the following letter: —

"Please deliver at once the following, and send invoice with goods: *About* 12 *tons Upriver Fine Para Rubber at* 2.42 *per lb. Equal monthly shipments January to June,* 1911.

CONDITIONS ON WHICH ABOVE ORDER IS GIVEN

Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders.

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guarantee on your part of prompt delivery within the specified time.

Terms F. O. B."

The fundamental question in this case is whether these writings constitute a contract between the parties. If they do not, no question as to whether these writings meet the requirements of the Statute of Frauds need be considered. An analysis of their provisions will show that they do not constitute a contract. It is not intended, and in face of the provisions of the plaintiff's letter of April 4th it cannot be claimed, that that letter is in itself a contract. It is merely an offer or proposal by the plaintiffs that the defendant should accept the proposed contract inclosed which is said to embody an oral order that the defendant had that day given the plaintiffs. The object of this letter was to have the terms of the oral agreement reduced to writing so that there could be no uncertainty as to the terms of the contract. The letter of the defendant of April 6th did not accept this offer. If the intention of the defendant had been to accept the offer made in the plaintiff's letter of April 4th, it would have been a simple matter for the defendant to have indorsed its acceptance upon the proposed contract which the plaintiff's letter of April 4th had inclosed. Instead of adopting this simple and obvious method of indicating an intent to accept the contract pro-

[1] A portion of the opinion is omitted.

posed by the plaintiffs the defendant submitted its own proposal and specified the terms and conditions upon which it should be accepted. The defendant's letter of April 6th was not an acceptance of this offer made by the plaintiffs in their letter of April 4th. It was a counter-offer or proposition for a contract. Its provisions make it perfectly clear that the defendant (1) asked the plaintiffs to deliver rubber of a certain quality and quantity at the price specified in designated shipments; (2) *it specified that the order therein given was conditional upon the receipt of its order being promptly acknowledged,* and (3) upon the further condition that the plaintiffs would guarantee delivery within the time specified. It may be urged that the condition specified in the defendant's order that the plaintiffs would guarantee the delivery of the goods within the time specified added nothing of substance to the agreement, because if the offer was accepted the acceptance itself would involve this obligation on the part of the plaintiffs. The other condition specified by the defendant cannot be disposed of in the same manner. That provision of the defendant's offer provided that the offer was conditional upon the receipt of the order being promptly acknowledged. It embodied a condition that the defendant had the right to annex to its offer. The import of this proposal was that the defendant should not be bound until the plaintiffs signified their assent to the terms set forth. When this assent was given and the acknowledgment made, this contract was then to come into existence and would be completely expressed in writing. The plaintiffs did not acknowledge the receipt of this order and the proposal remained unaccepted. As the party making this offer deemed this provision material and as the offer was made subject to compliance with it by the plaintiffs it is not for the court to say that it is immaterial. When the plaintiffs submitted this offer in their letter of April 4th to the defendant only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent which was essential to the creation of a contract or it could reject the offer. There was no middle course. If it did not accept the offer proposed it necessarily rejected it. A proposal to accept the offer if modified or an acceptance subject to other terms and conditions was equivalent to an absolute rejection of the offer made by the plaintiffs. Mactier's Admrs. *v.* Frith, 6 Wend, 103; Vassar *v.* Camp, 11 N. Y. 441; Chicago & G. E. R. Co. *v.* Dane, 43 N. Y. 240; Sidney Glass Works *v.* Barnes & Co., 86 Hun, 374; Mahar *v.* Compton, 18 App. Div. 536, 540; Nundy *v.* Matthews, 34 Hun, 74; Barrow Steamship Co. *v.* Mexican C. R. Co., 134 N. Y. 15.

TURNER *v.* McCORMICK

West Virginia Supreme Court of Appeals, June 6–November 1, 1904

[*Reported in* 56 *West Virginia*, 161]

Poffenbarger, President.[1] In the Circuit Court a demurrer to a bill for the specific performance of two alleged contracts for the sale of a vein of coal was sustained on the ground that the acceptance of the plaintiff was insufficient. The acceptance in question was as follows:

"Morgantown, W. Va., Feb. 21, 1902. Mr. William McCormick: I hereby notify you that your coal will be accepted according to terms of the option given to me on same and respectfully request you to make delivery of deed, with abstract of title, to me, in Morgantown, W. Va., on Saturday, June 28th, 1902, hour and place to be decided later. Yours truly, E. D. Turner."

Counsel for appellee say that if the first clause standing alone would amount to unconditional acceptance, converting the option into a contract, binding upon both parties, the addition of the request that delivery of the deed be made on the 28th day of June, a date more than ninety days after acceptance and after the time in which acceptance could be made, renders the notice insufficient. They say this request does not relate to performance of the contract after the making thereof as proposed, and that the insertion thereof in the written notice was an attempt to engraft upon the contract proposed conditions or terms not embodied in the original proposition; and, as the bill does not show any acceptance in writing of this new condition, the effort to change the original proposition has failed and no contract has been made. If this last clause of the deed thus qualified the first, it would work a change as to the time of payment of the purchase money and delivery of the deed. It would also designate a place of payment as to which the options are silent.

The contention of counsel for appellee is unsupported by authority. "If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because of inquiries whether the offerer will change his terms, or as to future acts, or the expression of a hope, or suggestions, etc." 9 Cyc. 269. "Plaintiff answered a proposition to lease 'I will accept your offer to lease to you at $200 per year for three or five years as you choose.' Defendant answered, 'Make out lease for place for five years at $200 per year.' He also said in this letter that he would like to build on a cookroom, with privilege to remove it. Plaintiff recognized that a

[1] A portion of the opinion is omitted.

lease for five years existed. *Held,* these letters made a lease, and the request as to the cookroom did not attach a condition to defendant's acceptance." Culton *v.* Gilchrist, 92 Ia. 718.

A case relied upon is Sawyer *v.* Brossart 67 Ia. 678. In that case, the defendant, a resident of Los Angeles, California, offered for sale, by letter, two business rooms in Iowa City, saying to the plaintiff: "You can have that building for thirty-five hundred dollars, or the two for $5,000. Let me hear from you at once." The alleged acceptance was by telegram from Iowa City, saying: "Accept your offer for two buildings at five thousand dollars. Money at your order at first National Bank here." The court held that the defendant "was entitled under his offer to have the money paid to him at his place of residence and to deliver the deed there, and that, as the acceptance of plaintiff was not an acceptance of the offer as made, it did not bind B.," the plaintiff. It is to be noted here that the plaintiff did not request permission to pay the money into the bank to the defendant's credit at Iowa City, but said, in effect, that the money had been paid there to his credit. Therefore, the payment into the bank at Iowa City was made a part of the acceptance. By such payment and notice plaintiff attempted to add a new condition to the contract proposed, which was silent as to the place of payment and, therefore, in law, contemplated payment at Los Angeles. It was not an unqualified acceptance coupled with a request for permission to pay at Iowa City.

Three cases referred to in one of the briefs for appellee, are, in all material respects, alike. They are Robinson *v.* Weller, 8 S. E. 449; Northwestern Iron Co. *v.* Meade, 94 Am. Dec. 557; and Egger *v.* Nesbitt, 43 Am. St. 596. They enunciate the proposition that an acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and payment of the money than the residence of the offerer, or the place named in the offer, is not an unconditional acceptance so as to bind the seller. This is asserted by several cases. Bilbert *v.* Baxter, 71 Ia. 327; Langellier *v.* Schaefer, 36 Minn 361. But they are all cases arising upon loose, informal correspondence, making it necessary to look to the whole of each paper to ascertain the true meaning and intent of the parties. None of the letters relied upon as acceptances said an offer was accepted in accordance with its terms, or that the property would be taken according to the terms of the letter of proposal. In none of them was the word "request" used, after language of unequivocal and definite acceptance as in this case. In Robinson *v.* Weller, the reply said: "Offer accepted; money ready; send deeds at once." In N. W. Iron Co. *v.* Meade the letter said: "If this is the very best offer you can make, you may properly execute the within deed," etc. In Egger *v.* Nesbitt, the reply said: "I will accept your proposition, with the understanding that you will deliver to me all papers," etc. Owing to the distinctions pointed out, these precedents

are not regarded as applicable or controlling in the present case.

Moreover, the reasoning in some of these cases is not entirely satisfactory. Nor does it seem to accord with principles announced in Watson *v.* Coast, 35 W. Va. 463. If a man says "I accept your offer," that makes a contract. It assents to all the terms of the offer. What more is necessary? There is a complete *"aggregatio mentium."* The acceptance conforms to the offer in every particular. How can a mere request relating, not to the making of the contract, but to its performance, be deemed to change it? Would the acceptor be permitted to excuse himself from performance on the ground of such request? No precedent of that kind has been found. They are all cases in which the proposer, desiring to escape from the consequences of his offer, because somebody else has proposed a higher price than the first asked, seeks to repudiate the transaction and sell to the other party. Property rights are sacred and should be well guarded by the law, but when a man has deliberately made a fair contract of sale, he ought not to be permitted to avoid it on some flimsy pretext, in order to avail himself of a better bargain. Time and place of payment, when not mentioned in an accepted offer, are fixed by law, and are matters of performance, carrying out the contract, a thing wholly distinct and separate from the making of the agreement. If, contemporaneously with, or subsequent to the making of the contract, either party suggest, request or propose a time, place or mode of performance, different from that agreed upon that does not of itself effect such change nor does it cause a breach, giving right of action or rescission to the other party. Swiger *v.* Hayman et als, 56 W. Va. 123. Either can compel the other to perform the contract as made. He may ignore the suggested, requested or proposed alteration of, or deviation from, the contract, as to the performance thereof. Watson *v.* Coast, 35 W. Va. 463. But, if the suggested departure in performance is not accompanied by a declaration of unqualified and unconditional acceptance of the offer, it would be otherwise of course. Some of the cases here referred to disclosed such acceptance and others did not. The former do not harmonize with the principles enunciated by this Court, and the latter do.

This somewhat lengthy review of the authorities bearing upon the question seems to establish the following propositions: First — A request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it. Second — A mere inquiry as to whether the proposer will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection, and if the offer be not withdrawn before acceptance made within a reasonable time, the offer becomes a binding contract. Third — A request, suggestion or proposal of alteration or modification, made after unconditional acceptance, and not assented to by the opposite party, does not affect the contract put in force and

effect by the acceptance, nor amount to a breach thereof, giving right of rescission. Fourth — Acceptance of a formal and carefully prepared option of sale of land, within the time by it allowed, and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance and converts the option into an executory contract of sale, provided the request be not so worded as to limit or qualify the acceptance.

The bill alleges a verbal acceptance of both options at the time of delivery of the acceptance in writing, and a verbal agreement extending the time of performance until June 28th. These allegations have provoked a good deal of argument on the subject of an extension of time of performance and alterations of written contracts by parol agreement. The conclusion above indicated renders it unnecessary to go into these questions or to examine the authorities cited as bearing upon them.

Our conclusion is that the acceptance in writing of the second proposal is unconditional and converts the proposal into a binding contract. The other option does not require the acceptance to be in writing. It was verbally accepted, and that is sufficient when the option does not require a written acceptance. Weaver *v.* Burr, 31 W. Va. 776; Watson *v.* Coast, 35 W. Va. 463; Barrett *v.* McCallister, 33 W. Va. 745; Creigh *v.* Boggs, 19 W. Va. 240; Capehart *v.* Hale, 6 W. Va. 547.

For the foregoing reasons, the decree complained of is reversed, the demurrer overruled and the cause is remanded for further proceedings. *Reversed.*

STEVENSON, JAQUES & CO. *v.* McLEAN

IN THE QUEEN'S BENCH DIVISION, May 25, 1880

[*Reported in* 5 *Queen's Bench Division,* 346]

LUSH, J. This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40*s.* per ton, nett cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for 1900*l.*, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on the 7th of May last.

The plaintiffs are makers of iron, and iron merchants at Middlesborough. The defendant being possessed of warrants for iron, which he had originally bought of the plaintiffs, wrote on the 24th of Sep-

tember to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at 39*s.*, which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig-iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I shall probably be able to wire you something definite on Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms: —

"Referring to R. A. McLean's letter to you *re* warrants, I have seen him again to-day, and he considers 39*s*, too low for same. At 40*s*. he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram: —

"Cannot make an offer to-day; warrants rather easier. Several sellers think might get 39*s*. 6*d*. if you would wire firm offer subject reply Tuesday noon."

In answer to this Fossick wrote on the same day: —

"Your telegram duly to hand *re* warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39*s*. 6*d*., but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows: —

"Mr. Fossick's clerk showed me a telegram from him yesterday mentioning 39*s*. for No. 3 as present price, 40*s*. for forward delivery. I instructed the clerk to wire you that I would now sell for 40*s*., nett cash, open till Monday."

No such telegram was sent by Fossick's clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer; and the other from the defendant himself, to the effect that he would sell for 40*s*., nett cash, and would hold it open all Monday. This it was admitted must have been the meaning of "open till Monday."

On the Monday morning, at 9.42, the plaintiffs telegraphed to the defendant: —

"Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10 A.M., and was delivered at the defendant's office in the Old Jewry shortly afterwards.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for 40*s.*, nett cash, and at 1.25 sent off a telegram to the plaintiffs: —

"Have sold all my warrants here for forty nett to-day."

This telegram reached Middlesborough at 1.46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1.34, the plaintiffs telegraphed to defendant: —

"Have secured your price for payment next Monday — write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed:

"Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied:

"Your two telegrams received, but your sale was too late; your sale was not per my instructions."

And to this the plaintiffs rejoined: —

"Have sold your warrants on terms stated in your letter of twenty-seventh."

The iron was sold by plaintiffs to one Walker at 41*s.* 6*d.*, and the contract note was signed before 1 o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfillment of their contract at a considerable advance on 40*s.*

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant: first, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some

one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to Hyde *v.* Wrench, 3 Beav. 334, where one party offered his estate for 1000*l.*, and the other answered by offering 950*l.* Lord Langdale, in that case, held that after the 950*l.* had been refused, the party offering it could not, by them agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which has been supposed to have been sanctioned by the Court of Queen's Bench in Cooke *v.* Oxley, 3 T. R. 653, that in order to constitute a contract there must be the assent or concurrence of the two minds at the moment when the offer is accepted; and that if, when an offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of Cooke *v.* Oxley, 3 T. R. 653, does not appear to me to warrant the inference which has been drawn from it, or the supposition that the judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till 4 in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before 4 o'clock. The Court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till 4 o'clock, and that the alleged promise to wait was *nudum pactum*.

All that the judgment affirms is, that a party who gives time to

another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with Cooke *v.* Oxley, 3 T. R. 653. It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end: see Routledge *v.* Grant, 4 Bing. 653. But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it: Adams *v.* Lindsell, 1 B. & A. 681. "Common sense tells us," said Lord Cottenham, in Dunlop *v.* Higgins, 1 H. L. C. 381, "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal. Cooke *v.* Oxley, 3 T. R. 653, if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in Cooke *v.* Oxley, 3 T. R. 653, the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in our Courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted:" Tayloe *v.* Merchants' Fire Insurance Co., 9 How. Sup. Court Rep. 390; and in Byrne & Co. *v.* Leon Van Tienhoven & Co., 49 L. J. (C. P.) 316, my brother Lindley, in an elaborate judgment, adopted this view, and held that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all.

It follows, that as no notice of withdrawal of his offer to sell at 40*s.*, nett cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for 1900*l.*, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for 1900*l.* The costs of the arbitration to be in the arbiter's discretion.

Judgment for the plaintiffs.

DICKINSON *v.* DODDS

IN THE HIGH COURT OF JUSTICE, January 25, 26, 1876
IN THE COURT OF APPEAL, March 31, April 1, 1876

[*Reported in* 2 *Chancery Division,* 463]

On Wednesday, the 10th of June, 1874, the defendant John Dodds signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows: —

I hereby agree to sell to Mr. George Dickinson the whole of the dwelling houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of 800*l.* As witness my hand this tenth day of June, 1874.
800*l.* (Signed) JOHN DODDS.

P.S. — This offer to be left over until Friday, 9 o'clock, A.M. J.D. (the twelfth), 12th June, 1874. (Signed) J. DODDS.

The bill alleged that Dodds understood and intended that the plaintiff should have until Friday, 9 A.M., within which to determine whether he would or would not purchase, and that he should absolutely have, until that time, the refusal of the property at the price of 800*l.*, and that the plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance, in writing, of the offer to sell the property. According to the evidence of Mrs. Burgess, this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the defendant Allan for 800*l.*, and had received from him a deposit of 40*l.*

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance;

that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor Bacon on the 25th of January, 1876.

Kay, Q. C., and *Caldecott,* for the plaintiff.

Swanston, Q. C., and *Crossley,* for the defendant Dodds.

Jackson, Q. C., and *Gazdar,* for the defendant Allan.

[Bacon, V. C., decreed specific performance in favor of the plaintiff, on the ground that by the original offer or agreement with the plaintiff, and by relation back of the acceptance to the date of the offer, Dodds had lost the power to make a sale to Allan. From this decision the defendants appealed.]

James, L.J., after referring to the document of the 10th of June, 1847, continued: —

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed, there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: "This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum,* was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one at the same moment of time; that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way to let the other know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no

longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the plaintiff's own statements in the bill.

The plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not, in point of law, withdraw his offer, meaning to fix him to it, and endeavoring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that, before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the plaintiff has failed to prove that there was any binding contract between Dodds and himself.

Mellish, L.J. I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says — and it is a perfectly clear rule of law — that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when, on the next day, he made an

agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this: If an offer has been made for the sale of property, and, before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can, by acceptance, make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead,[1] and parting with the property

[1] The Palo Alto, 2 Ware, 343, 359; Pratt *v.* Baptist Soc., 93 Ill. 475; Beach *v.* First M. E. Church, 96 Ill. 179; Wallace *v.* Townsend, 43 Ohio St. 537; Phipps *v.* Jones,

has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as, when a man who has made an offer dies before it is accepted, it is impossible that it can be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.[1]

SHUEY, Executor, *v.* UNITED STATES

Supreme Court of the United States, October Term, 1875

[*Reported in* 92 *United States*, 73]

Appeal from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of $15,000, being the balance alleged to be due him of the reward of $25,000 offered by the Secretary of War, on the 20th of April, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The court below found the facts as follows: —

1. On the 20th April, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," $25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On the 14th November, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

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20 Pa. 260. Helfenstein's Est., 77 Pa. 328; Foust *v.* Board of Publication, 8 Lea, 555, *acc.* This rule is the same in the civil law. Valéry, Contrats par Correspondance, § 204; Windscheid, Pandektenrecht, § 307 (2). The Bürgerliches Gesetzbuch, however, has changed the rule in Germany. It provides, § 153, "A contract is not prevented from coming into existence by the death or incapacity of the offerer before acceptance, unless the offerer has expressed a contrary intention."

[1] Bargallay, J. A., concurred, and the bill was dismissed with costs. Coleman *v.* Applegarth, 68 Md. 21, was very similar in its facts to Dickinson *v.* Dodds, and that case was cited and followed. To the same effect are Watters *v.* Lincoln, 29 S. Dak. 98; Frank *v.* Stratford-Hancock, 13 Wyo. 37. Compare Sherley *v.* Pechl, 84 Wis. 46, 52.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King, the American minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American minister, over Surratt. Thereupon certain diplomatic correspondence passed between the government of the United States and the Papal government relative to the arrest and extradition of Surratt; and on the 6th November, 1866, the Papal government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape and both before and after his embarkation at Naples, the American minister at Rome, being informed of the escape by the Papal government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American government to the United States; but the American minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the act of 27th July, 1868 (15 Stat. 234, sect. 3), the sum of $10,000. Such payment was made by a draft on the treasury payable to the order of the claimant, which draft was by him duly indorsed.

The Court found as a matter of law that the claimant's service, as set forth in the foregoing finding, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly: whereupon an appeal was taken to this Court.

Ste. Marie having died *pendente lite,* his executor was substituted in his stead.

Mr. D. B. Meany and *Mr. F. Carroll Brewster,* for the appellant.
Mr. Assistant Attorney-General Edwin B. Smith, contra.

Mr. Justice Strong delivered the opinion of the Court.

We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of $25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of $25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest, — persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made. *Judgment affirmed.*[1]

[1] See also Hudson Real Estate Co. *v.* Tower, 161 Mass. 10.

BIGGERS ET. AL. *v.* OWEN ET AL.

GEORGIA SUPREME COURT, October Term, 1887

[*Reported in* 79 *Ga.* 658.]

BLANDFORD, Justice. McMichael and Owens brought their action of assumpsit against B. A. Biggers, P. J. Biggers, Jr., and T. J. Pearce (the plaintiff in error here) in the city court of Columbus, to recover a reward of $500, which they alleged had been offered by the defendants. The offer of reward was printed as an advertisement in a newspaper in Columbus, as follows: —

"We will pay $500, the above reward, for the delivery to the sheriff of Muscogee County of the party or parties, with evidence to convict, who administered the poison in the meal which proved fatal to J. W. Biggers and J. F. Burgess and wife on the 11th of November."

Signed B. A. BIGGERS, P. J. BIGGERS, JR., T. J. PEARCE.

Upon the trial of the case, the jury rendered a verdict in favor of the plaintiffs for the amount of the reward, $500.

It appeared from the evidence that when this reward was offered, the plaintiffs arrested a certain woman, and delivered her to the sheriff of Muscogee County; that a committing trial was had before a justice of the peace and the woman discharged for the want of sufficient evidence to commit. The reward was then withdrawn; but McMichael testifies that after it was withdrawn, Pearce told him to go on, that he would pay him what his services were worth. After this, a warrant was sued out for the same woman by Mr. Pearce. McMichael, being a bailiff in the Court, executed the warrant and arrested her. She was indicted for the poisoning, was tried and convicted. The judge in the Court below charged the jury that if this reward was offered, and the plaintiffs thereupon furnished evidence going to show that this woman was guilty of the crime, they were entitled to recover the amount of the reward. The Court was requested to charge that if, after this reward was offered, it was withdrawn before the plaintiffs performed the services contemplated by the reward, that no recovery could be had, under the declaration in this case. The Court refused to give this in charge as requested, but charged to the contrary.

We think the Court erred in declining to charge as requested, and in charging as he did. An offer of reward is nothing more than a proposition; it is an offer to the public. and until some one complies with the terms or conditions of that offer, it may be withdrawn. This is well-settled law, as to which there can be no dispute, and counsel in this case did not contend otherwise. When this offer of reward was withdrawn, and Pearce afterwards told McMichael to go on with the case, that he would pay for his services, Pearce did not thereby become liable to pay him the amount of this reward, but only to pay him for the value of his services. And this is not an

action upon a *quantum meruit* to recover the value of such services; but is an action to recover specifically the amount of this reward, $500. There was no evidence introduced in the Court below to show what the value of the services was, and the record does not distinctly show what services were performed.

The Court having erred in failing to change as requested, and in charging the jury as above set out, we consider it unnecessary to say more about the case; and we therefore reverse the judgment.

Judgment reversed.

JOSEPH A. BRACKENBURY ET AL. *v.* SARAH D. P. HODGKIN ET AL.

SUPREME JUDICIAL COURT OF MAINE, October 27, 1917

[*Reported in* 116 *Maine,* 399]

CORNISH, C.J.[1] The defendant, Mrs. Sarah D. P. Hodgkin, on the eighth day of February, 1915, was the owner of certain real estate, her home farm, situated in the outskirts of Lewiston. She was a widow and was living alone. She was the mother of six adult children, five sons, one of whom, Walter, is the co-defendant, and one daughter, who is the co-plaintiff. The plaintiffs were then residing in Independence, Missouri. Many letters had passed between mother and daughter concerning the daughter and her husband returning to the old home and taking care of the mother, and finally, on February 8, 1915, the mother sent a letter to the daughter and her husband which is the foundation of this bill in equity. In this letter she made a definite proposal, the substance of which was that if the Brackenburys would move to Lewiston and maintain and care for Mrs. Hodgkin on the home place during her life, and pay the moving expenses, they were to have the use and income of the premises, together with the use of the household goods, with certain exceptions, Mrs. Hodgkin to have what rooms she might need. The letter closed, by way of postscript, with the words: "you to have the place when I have passed away."

Relying upon this offer, which was neither withdrawn nor modified, and in acceptance thereof, the plaintiffs moved from Missouri late in April, 1915, went upon the premises described and entered upon the performance of the contract. Trouble developed after a few weeks and the relations between the parties grew most disagreeable. The mother brought two suits against her son-in-law on trifling matters and finally ordered the plaintiffs from the place, but they refused to leave. Then on November 7, 1916, she executed and delivered to her son, Walter C. Hodgkin, a deed of the premises, reserving a life estate in herself. Walter, however, was not a bona

[1] A portion of the opinion is omitted.

fide purchaser for value without notice but took the deed with full knowledge of the agreement between the parties and for the sole purpose of evicting the plaintiffs: On the very day the deed was executed he served a notice to quit upon Mr. Brackenbury, as preliminary to an action of forcible entry and detainer which was brought on November 13, 1916. This bill in equity was brought by the plaintiffs to secure a reconveyance of the farm from Walter to his mother, to restrain and enjoin Walter from further prosecuting his action of forcible entry and detainer and to obtain an adjudication that the mother holds the legal title impressed with a trust in favor of the plaintiffs in accordance with their contract.

The sitting Justice made an elaborate and carefully considered finding of facts and signed a decree, sustaining the bill with costs against Walter C. Hodgkin and granting the relief prayed for. The case is before the Law Court on the defendants' appeal from this decree.

Four main issues are raised.

1. As to the completion and existence of a valid contract.

A legal and binding contract is clearly proven. The offer on the part of the mother was in writing and its terms cannot successfully be disputed. There was no need that it be accepted in words nor that a counter promise on the part of the plaintiffs be made. The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. "In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words the promise becomes binding when the act is performed." 6 R. C. L., 607. This is elementary law.

The plaintiffs here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified facts, and they have continued performance since that time so far as they have been permitted by the mother to do so. The existence of a completed and valid contract is clear.[1]

[1] By express provision of the codes in many European countries, an offer is irrevocable until the person addressed has had a reasonable time to answer it. See Valéry, Contrats par Correspondance, p. 167. In the absence of such legislation the weight of opinion in the civil law is that an offer may be revoked, *ibid.* There has been much discussion and difference of opinion, however, as to the liability of an offerer who revoked his offer for such damage as the person addressed may have incurred by acting in reliance on the offer. The theory of the offerer's liability was first carefully elaborated by von Ihering, Jahrbücher für Dogmatick, IV. p. 1 *seq.*, under the heading of *culpa in contrahendo*. For the varying views of other writers, see Windscheid, Lehrbuch des Pandektenrechts, II, § 307, n. 8 (8th ed.); Valéry, § 185.

C. — Acceptance

RAFFLES *v.* WICHELHAUS and Another

In the Exchequer, January 20, 1864

[*Reported in* 2 *Hurlstone & Coltman,* 906]

Declaration: for that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollerah, to arrive ex "Peerless" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17¼*d.* per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, &c. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea: that the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the "Peerless." The words "to arrive ex 'Peerless'" only mean that, if the vessel is lost on the voyage, the contract is to be at an end. [Pollock, C. B. It would be a question for the jury whether both parties meant the same ship called the "Peerless."] That would be so if the contract was for the sale of a ship called the "Peerless;" but it is for the sale of cotton on board a ship of that name. [Pollock, C. B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that, if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that

case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless." [MARTIN, B. It is imposing on the defendant a contract different from that which he entered into. POLLOCK, C. B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [POLLOCK, C. B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (*Cohen* with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the "Peerless" was meant; but the moment it appears that two ships called the "Peerless" were about to sail from Bombay, there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no *consensus ad idem*, and therefore no binding contract. [He was then stopped by the Court.]

PER CURIAM. There must be judgment for the defendants.

Judgment for the defendants.

FALCK *v.* WILLIAMS

IN THE PRIVY COUNCIL, ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES, December 6, 9, 1899.

[*Reported in* [1900] *Appeal Cases*, 176]

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Mr. Falck, who was plaintiff in the action and is now the appellant, was a shipowner residing in Norway; Williams, the respondent, was a shipbroker in Sydney, New South Wales.

Through one Buch, who was a shipbroker and chartering agent at Stavanger, in Norway, Falck did a good deal of business with Williams.

Buch and Williams corresponded by means of a telegraphic code, or rather a combination of two codes arranged between them. It was owing to a misunderstanding of a code message relating to one of Falck's vessels called the "Semiramis" that the difficulty arose which led to the present litigation.

Falck sued Williams for breach of a contract of affreightment to load the "Semiramis" with a cargo of copra in Fiji for delivery in

the United Kingdom or some port in Europe. Williams understood the proposal made to him to be a proposal for carriage of a cargo of shale to be loaded at Sydney and delivered at Barcelona, and he accepted the proposal under this impression. It was conceded that both parties acted in good faith, and that the mistake was unintentional, whoever might be to blame for the misunderstanding.

The case came on for trial before OWEN, J., and a jury. A verdict was taken by consent for the defendant. . The amount of damages, if damages were recoverable, was fixed by agreement. All other questions were reserved for the Full Court. The Full Court dismissed the action with costs.

The first question is, Was there a contract? If there was no contract in fact, Was the proposal made on Falck's behalf so clear and unambiguous that Williams cannot be heard to say that he misunderstood it? If that question be answered in the negative, all other questions become immaterial.

The negotiation in reference to the "Semiramis" began apparently on February 7, 1895, by a telegram from Williams to Buch. Williams offered to load the "Semiramis" with shale at Sydney Wharf for Barcelona "at freight per ton dead weight 27*s.*" Buch replied by telegram, dated February 9, asking 2250*l.* as a lump sum for freight. On February 12 Williams offered 27*s.* 6*d.* "per ton dead weight." On the 13th Buch offered to accept that sum on the ship's dead weight "capacity." By telegram on the 14th Williams explained that the rate offered was "per ton dead weight discharged." On the 15th Buch replied that the freight was to be payable "on guaranteed dead weight capacity," or to be a lump sum of 2100*l.*, adding a word interpreted to mean "Do your best to obtain our figures, vessel will not accept less." Then, on the 16th, Williams asked what was the guaranteed dead weight capacity of the ship. The answer on the 17th was "1550" tons. On the 18th Williams telegraphed, "Shippers will not pay more than they have already offered at per ton dead weight discharged." He also offered in the same telegram to engage a vessel to load shale at Sydney for Liverpool, at freight per ton dead weight 23*s.*

Having had no reply to his telegram of the 18th, Williams, on the 21st, telegraphed to Buch, "Why do you not reply to our last telegraph? It is very important that we have immediate reply." And he went on to offer to engage a vessel to load copra at two ports in the Fiji Islands, deliverable in the United Kingdom, or some port on the Continent, at 47*s.* 6*d.* per ton cargo delivered.

Then we come to the disputed message. On February 22 Buch telegraphed as follows: "Shale Copyright Semiramis Begloom Estcorte Sultana Brilliant Argentina Bronchil." That message with the code words interpreted runs thus: "Shale. Your rate is too low, impossible to work business at your figures. Semiramis. Have closed in accordance with your order. Confirm. Two ports Fiji

Islands. Sultana. Brilliant. Argentina. Keep a good look-out for business for this vessel and wire us when anything good offers."

On the following day Williams telegraphed, "Semiramis, we confirm charter." And, in accordance with his reading of the telegram of February 22, he at once proceeded in the name and on behalf of Falck to charter the "Semiramis" to carry a cargo of shale from Sydney to Barcelona. So the controversy arose. And after mutual explanations or mutual recrimination the action was brought.

Now, it is impossible to contend that there was a contract in fact. Obviously the parties were not at one. Obviously the acceptance by Williams as he meant it to be understood had no connection with or reference to the proposal which Buch intended to make and thought he was making.

But then, said the learned counsel for the appellant, the message of February 22 was too plain to be misread. An intelligent child would have understood it. Business cannot go on if men of business are allowed to shelter themselves under such a plea. Their Lordships are unable to take that view of the disputed message. When the message was sent there were three matters under consideration. There was the Barcelona charter for the "Semiramis," there was the offer for a Liverpool charter, and there was the Fiji proposal. Of these the most important and the most pressing was the Barcelona charter. True, the negotiation was at a deadlock for the moment, but the parties were so nearly at one that it was only reasonable to expect that they would come to terms, and it is to be observed that during the negotiation, which seems to have been unusually protracted, the "Semiramis" was never once mentioned in connection with any other voyage. Whether the appellant's view or the respondent's view be correct, the telegram of February 22 seems to deal with all three points. The appellant says that the first two words of the code message deal compendiously with both the Barcelona charter and the Liverpool proposal, and that the next three words deal with the "Semiramis," the last word of the three indicating clearly that she was to be sent to Fiji. The respondent says that the first two words refer to the Liverpool proposal, the second two to the Barcelona charter, and that the fifth word, "estcorte," is to be read with what follows. Indeed, the whole controversy when the matter is threshed out seems to be narrowed down to this question — "Is the word "estcorte" to be read with what has gone before or with what follows? In their Lordships' opinion there is no conclusive reason pointing one way or the other. The fault lay with the appellant's agent. If he had spent a few more shillings on his message, if he had even arranged the words he used more carefully, if he had only put the word "estcorte" before the word "begloom" instead of after it, there would have been no difficulty. It is not for their Lordships to determine what is the true construction of Buch's telegram. It was the duty of the appellant as plaintiff to make out that the

construction which he put upon it was the true one. In that he must fail if the message was ambiguous, as their Lordships hold it to be. If the respondent had been maintaining his construction as plaintiff he would equally have failed.

Their Lordships will therefore humbly advise Her Majesty that this appeal must be dismissed. The appellant will pay the costs of the appeal.

NATHANIEL B. MANSFIELD *v.* BENJAMIN E. HODGDON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 23–June 21, 1888

[*Reported in* 147 *Massachusetts,* 304]

HOLMES, J.: This is a bill specifically to enforce a covenant to sell to the plaintiff "the farm situated in that part of Mount Desert Island called Pretty Marsh, and consisting of between two hundred and sixty and two hundred and seventy acres, and standing in the name of Benjamin Hodgdon, for the sum of fifteen hundred dollars cash, at any time within thirty days from the date hereof." The instrument is dated January 15, 1887, and is signed by the defendant Hodgdon, but not by his wife. The defendant Clara E. Allen is a subsequent grantee of the premises, and the remaining defendant, William H. Allen, is her husband. The judge who heard the witnesses made a decree for the plaintiff, and, the evidence having been reported, the defendants appealed.

Giving to the finding of the judge the weight which it must have, we think the evidence must be taken to establish the following facts. The instrument was sealed by Hodgdon, and has not been altered. The plaintiff expressed his election to purchase within the thirty days allowed. There was evidence of a message to that effect having been left at Hodgdon's house within ten days. It appears that a blank deed to the plaintiff and another was left there about the same time, and there was evidence that a message was sent to Hodgdon to execute it if he found it correct. There was also evidence that the deed was returned unexecuted, with the message that Mrs. Hodgdon refused to sign it, and with no other objection in the first instance. These facts warranted a finding that sending the deed implied, and was understood to imply, notice that the plaintiff intended to buy, at least if the deed corresponded to the contract (see Warner *v.* Willington, 3 Drew. 523, 533), and perhaps whether it corresponded or not, as the message, even as testified to by Hodgdon, imported a willingness to correct mistakes.

The defendants take the ground that this deed did not correspond to the contract, because the deed included a mountain lot which is alleged not to be included in the land described by the contract. The

question whether that lot is included in the contract is also important, of course, in deciding what land, if any, the defendant Allen should be required to convey. The words used must be construed in the light of the circumstances, and thus construed they might well have been found to import, and to have warranted the plaintiff in understanding that they imported, all the defendant Hodgdon's land in Mount Desert.

Hodgdon owned only three lots in Mount Desert. Two, of seventy and eighty acres respectively, are admitted to be embraced in the contract. The mountain lot, seemingly then regarded as of little or no value, and said to contain sixty acres, brings the total up to two hundred and ten acres. The contract was for between two hundred and sixty and two hundred and seventy acres. Hodgdon says that the plaintiff was introduced to him by a letter saying that he wished the refusal of the property down East for thirty days, evidently suggesting a bargain for the whole. The plaintiff testifies that, before signing, Hodgdon said that he had not so much land as was mentioned, but had so many acres in one lot, so many in another, and so many in a third, amounting in all to two hundred and fifteen acres, and that was all he owned; that the plaintiff said it did not make any difference whether it was two hundred and fifteen, or two hundred and sixty, or two hundred and seventy acres; and that thereupon Hodgdon signed. Hodgdon acquired all the land by one deed, had previously offered the whole land as two hundred and sixty acres to others, subsequently made a deed of the three lots to the plaintiff, which was not delivered, and conveyed them by a similar deed to the defendant Mrs. Allen.

It is suggested that Hodgdon understood that the plaintiff was to pay him $1,500 for the land, subject to a mortgage. But the agreement contains no such qualification, and must be construed as an agreement to convey a good title free from incumbrances, which there is evidence tending to show was the meaning of the parties. Linton *v.* Hichborn, 126 Mass. 32. If, without the plaintiff's knowledge, Hodgdon did understand the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts. Western Railroad *v.* Babcock, 6 Met. 346, 352; O'Donnell *v.* Clinton, 145 Mass. 461, 463.[1]

1 See also Baines *v.* Woodlall, 6 C. B. N. S. 657; Smith *v.* Hughes, L. R. 6 Q. B. 607; Ireland *v.* Livingston, L. R. 5 H. L. 395; Preston *v.* Luck, 27 Ch. D. 497; Van Praagh *v.* Everidge, [1902] 2 Ch. 266; Thompson *v.* Ray, 46 Ala. 224; Wood *v.* Duyal, 100 Ia. 724; Lull *v.* Anamosa Nat. Bank 110 Ia. 537; Wood *v.* Allen, 111 Ia. 97 Miller *v.* Lord, 11 Pick, 11; Stoddard *v.* Ham, 129 Mass. 383; Tallant *v.* Stedman, 176 Mass. 460, 466; Home F. I. Co. *v.* Bredehoft, 49 Neb. 152; Phillip *v.* Gallant, 62 N. Y. 256; Neufville *v.* Stuart. Hill Esq. (S. C.) 159; J. A. Coates & Son *v.* Buck, 93 Wis. 128. But see Green *v.* Bateman, 2 Wood & M. 359: Lamar Elevator Co. *v.* Craddock, 5 Col. App. 203; Hartford, &c. R. R. Co. *v.* Jackson, 24 Conn. 514; Rowland New York, &c. R. R. Co. 61 Conn. 103; Brant *v.* Gallup, 5 Ill. App. 262; Clay *v.* Rickets. 662; Ia. 363; Hogue *v.* Mackey, 44 Kan. 277; Frazer *v.* Small, 59 Hun. 619.

The plaintiff, although he signified his election to take the land within thirty days, did not pay or tender the money within that time. But there is evidence that Hodgdon was responsible for this. At or soon after the time when word was sent that Mrs. Hodgdon refused to sign, a demand or request was made that Mrs. Hodgdon should have three acres out of one of the other lots as a consideration for her signing the deed. Of course, under the contract the plaintiff had a right to call upon Mr. Hodgdon to give a good title to the whole, but he was disposed to yield something. A discussion ensued, of course on the footing that the plaintiff was desirous of making the purchase, which of itself was evidence that the defendant Hodgdon had notice of the fact, and this was prolonged beyond the thirty days. When the parties came to terms, a new deed was prepared and tendered, was executed by the Hodgdons, and was handed to a Mr. Chapin, who had acted as a go-between. But later in the same day Chapin was ordered not to deliver the deed, and the bargain with the plaintiff was repudiated. There is no dispute that the plaintiff was ready to pay for the land at any time when he could get a conveyance.

Afterwards Hodgdon conveyed to Mrs. Allen, Mrs. Hodgdon releasing dower. But Mrs. Allen had full notice of the agreement with the plaintiff before the conveyance to her, and before any agreement was made with her or her husband, and, although informed that the thirty days had gone by, she had notice that the plaintiff was expecting a conveyance, and that Hodgdon might have trouble by reason of his refusal to convey to the plaintiff. Connihan *v.* Thompson, 111 Mass. 270; Hansard *v.* Hardy, 18 Ves. 455, 462. Mr. Allen was asked whether he knew that the plaintiff had sued Hodgdon for damages before the purchase. This must have meant before the final conveyance to Mrs. Allen, as Mrs. Allen was party to getting the deed back from Mr. Chapin, and had notice of the plaintiff's rights at that time, before any suit was begun. But the evidence was excluded, and Mr. Allen's answer is not properly before us. He did not suggest that he was led by his knowledge to assume that the plaintiff would not seek specific performance, and must be taken to have known that the plaintiff still had the right to do so. Connihan *v.* Thompson, *ubi supra.*

The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within thirty days. The usual doctrine as to conditions applies to such a covenant, and as the covenantor by his own conduct caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender when the new terms had been agreed upon, by wholly repudiating the contract. Carpenter *v.* Holcomb, 105 Mass. 280, 282; Ballou *v.* Billings, 136 Mass. 307;

Gormley *v.* Kyle, 137 Mass. 189; Lowe v. Harwood, 139 Mass, 133, 136. If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay. Galvin *v.* Collins, 128 Mass. 525, 527.

Decree affirmed.[1]

FRED W. AYER *v.* WESTERN UNION TELEGRAPH COMPANY

SUPREME JUDICIAL COURT OF MAINE, August 24, 1887

[*Reported in* 79 *Maine,* 493]

EMERY, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: —

"Will sell 800M. laths, delivered at your wharf, two ten net cash. July shipment. Answer quick."

The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: —

"Will sell 800M. laths delivered at your wharf two net cash. July shipment. Answer quick."

It will be seen that the important word "ten" in the statement of price was omitted.

The Philadelphia party immediately returned by telegraph the following answer: —

"Accept your telegraphic offer on laths. Cannot increase price spruce."

Letters afterward passed between the parties which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to wit, at $2.00 per M. He testified that his correspondent insisted he was entitled to the laths at the price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for, or explain the mistake in the transmission of, the message. The presumption therefore is, that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. Bartlett *v.* Tel. Co., 62 Maine, 221.

[1] A portion of the opinion is omitted.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference between the market price of the laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds.[1]

II. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question, whether the message written by the sender and entrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important and not easy of solution. It would be hard, that the negligence of the telegraph company, or any error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error, lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price by making that error in the transmission. On the other hand, the receiver of the offer may, in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall. We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal

[1] The first ground was a stipulation printed on the telegraph blank, purporting to limit the liability of the company for unrepeated messages. A part of the opinion in which this defence was held invalid is omitted.

and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

Of course the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forced messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In Durkee *v.* Vt. C. R. R. Co., 29 Vt. 137, it was held, that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In Saveland *v.* Green, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In Morgan *v.* People, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff, receiving such a telegram from the judgment creditor, was bound to follow it, as it read. There are dicta to the same effect, in Wilson *v.* M. & N. Ry. Co., 31 Minn. 481, and Howley *v.* Whipple, 48 N. H. 488.

Tel. Co. *v.* Schotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message, "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read, "Can deliver hundred turpentine at sixty," the word four being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty, as that was not his offer. The Court held, however, that there was a complete contract at sixty — that the sender must fulfil it, and could recover his consequent loss of the telegraph company.

It follows, that the plaintiff in this case is entitled to recover the difference between the two dollars and the market, as to laths. The evidence shows that the difference was ten cents per M.

Judgment for plaintiff for eighty dollars, with interest from the date of the writ.[1]

[1] Western Union Tel. Co. *v.* Flint River Lumber Co. 114 Ga. 576; Haubelt *v.* Rea & Page Mill Co., 77 Mo. App. 672; J. L. Price Brokerage Co. *v.* Chicago &c. R.

STERN *v.* MONEYWEIGHT SCALE COMPANY

DISTRICT OF COLUMBIA COURT OF APPEALS, March 4–April 6, 1914

[*Reported in* 42 *Appeal Cases, District of Columbia,* 162]

ACTION by the Moneyweight Scale Company based on a written order for a scale. The defendant made affidavit of defence alleging that the plaintiff's agent called upon him, and, after importuning him to buy a scale and being refused, "shoved the paper partly printed and partly written at affiant, who can neither read nor write English, saying: 'that paper was the necessary authorization to send said scale on approval.'"

Mr. Justice ROBB delivered the opinion of the Court:

If the averments in the affidavit of defense are true, and we must here assume them to be, the defendant was induced to sign the order and note through the misrepresentations of plaintiff's agent. May he defend this action upon such a ground? It is true that it is as much the duty of a person who cannot read the language in which a contract is written, to have someone read it to him before he signs it, as it is the duty of one who can read to peruse it himself before signing it. Toledo Computing Scale Co. *v.* Garrison, 28 App. D. C. 243. But this general rule does not reach the case before us. As between the parties to a written contract, the party who, though able to read, was induced through the misrepresentations of the other party as to its contents to sign it without reading, may avoid it on the ground of fraud. Thus, in Providence Jewelry Co. *v.* Crowe, 113 Minn. 209, 129 N. W. 224, the action was upon a written contract for goods sold and delivered. The defendant was a business man who signed the written contract without reading it, having been induced to do so by the representations of the plaintiff's agent to the effect that its terms were in accordance with the oral agreement preceding it. The court ruled that, although the defendant had shown "want of ordinary business procedure in signing the contract without reading it," he could nevertheless defend on the ground of fraud as against the other party. The court said: "Plaintiff cannot escape from the consequences of its fraud by asserting that the defendant ought not to have confided in its integrity." To the same effect are American Fine Art Co. *v.* Reeves Pulley Co. 62

(Mo. App.) 199 S. W. Rep. 732; Howley *v.* Whipple, 48 N. H. 487 *acc.;* Henkel *v.* Pape, L. R. 6 Ex. 7; Verdin *v.* Robertson, 10 Ct. Sess. Cas. (3d series) 35; Jackson Lumber Co. *v.* Western Union Tel. Co. 7 Ala. App. 644; Postal Tel. Co. *v.* Schaefer 110 Ky. 907; Shindler *v.* Western Union Tel. Co. 72 Miss. 1030; Pepper *v.* Telegraph Co., 87 Tenn. 554, *contra.* See also Penobscot Fish Co. *v.* Western Union Tel. Co. Conn. 35, and compare Germain Fruit Co. *v.* Western Union Tel. Co. 137 Cal. 598; Central of Georgia Ry. *v.* Gortatowsky, 123 Ga. 366.

The question has been disputed on the continent of Europe also. See Lyon-Caen et Renault, Traité de Droit Commercial, Vol. III. § 23.

C. C. A. 488, 127 Fed. 808; Elizabeth *v.* Mitchell, 74 N. J. L. 342, 68 Atl. 89; J. Weil & Co. *v.* Quidnick Mfg. Co. 33 R. I. 58, 80 Atl. 447; Linington *v.* Strong, 107 Ill. 295; Prestwood *v.* Carlton, 162 Ala. 327, 50 So. 254. It is apparent, from the foregoing, that the affidavit of defense should have been held sufficient to entitle the defendant to a hearing upon the merits. Codington v. Standard Bank, 40 App. D. C. 409.[1]

KELLEY ASPHALT BLOCK COMPANY, Respondent, *v.* BARBER ASPHALT PAVING COMPANY, Appellant

New York Court of Appeals, March 26–April 14, 1914

[*Reported in* 211 *New York,* 68]

Cardozo, J.: The plaintiff sues to recover damages for breach of an implied warranty. The contract was made between the defendant and one Booth. The plaintiff says that Booth was in truth its agent, and it sues as undisclosed principal. The question is whether it has the right to do so.

The general rule is not disputed. A contract not under seal made in the name of an agent as ostensible principal, may be sued on by the real principal at the latter's election. (Henderson, Hull & Co. *v.* McNally, 48 App. Div. 134; affirmed on opinion below, 168 N. Y. 646; Cothway *v.* Fennell, 10 B. & C. 671.) The defendant says that we should establish an exception to that rule, where the identity of the principal has been concealed because of the belief that, if it were disclosed, the contract would not be made. We are asked to say that the reality of the defendant's consent is thereby destroyed, and the contract vitiated for mistake.

The plaintiff and the defendant were competitors in business. The plaintiff's president suspected that the defendant might refuse to name him a price. The suspicion was not based upon any previous refusal, for there had been none; it had no other origin than their relation as competitors. Because of this doubt the plaintiff availed itself of the services of Booth, who, though interested to the defendant's knowledge in the plaintiff's business was also engaged in a like business for another corporation. Booth asked the defendant for a price and received a quotation, and the asphalt blocks required for the plaintiff's pavement were ordered in his name. The order was accepted by the defendant, the blocks were delivered and payment was made by Booth with money furnished by the plaintiff. The paving blocks were unmerchantable, and the defendant, retaining the price, contests its liability for damages on the ground that if it had known that the plaintiff was the principal, it would have refused to make the sale.

[1] The statement of facts is abbreviated and a portion of the opinion omitted.

We are satisfied that upon the facts before us the defense cannot prevail. A contract involves a meeting of the minds of the contracting parties. If "one of the supposed parties is wanting," there is an absence of "one of the formal constituents of a legal transaction." (Rodliff *v.* Dallinger, 141 Mass. 1, 6.) In such a situation there is no contract. A number of cases are reported where A has ordered merchandise of B, and C has surreptitiously filled the order. The question has been much discussed whether C, having thrust himself without consent into the position of a creditor, is entitled to recover the value of his wares. (Boston Ice Co. *v.* Potter, 123 Mass. 28; Boulton *v.* Jones, 2 H. & N. 564; Gordon v. Street, L. R. (2 Q. B. 1899) 641; Barcus *v.* Dorries, 64 App. Div. 109; Kling *v.* Irving Nat Bank, 21 App. Div. 373; 160 N. Y. 698; Randolph Iron Co. *v.* Elliot, 34 N. J. L. 184; 7 Halsbury, The Laws of England, title Contracts, pp. 354, 355.) That question is not before us, but we express no opinion concerning it. We state it merely to accentuate the distinction between the cases which involve it and the case at hand. Neither of the supposed parties was wanting in this case. The apparent meeting of the minds between determinate contracting parties was not unreal or illusory. The defendant was contracting with the precise person with whom it intended to contract. It was contracting with Booth. It gained whatever benefit it may have contemplated from his character and substance. (Humble *v.* Hunter, 12 Ad. & El. (N.S.) 311; Arkansas Smelting Co. *v.* Belden Co., 127 U. S. 379, 387; American Colortype Co. *v.* Continental Colortype Co., 188 U. S. 104.) An agent who contracts in his own name for an undisclosed principal does not cease to be a party because of his agency. (Higgins *v.* Senior, 8 M. & W. 834, 844.) Indeed, such an agent, having made himself personally liable, may enforce the contract though the principal has renounced it. (Short *v.* Spackman, 2 B. & Ad. 962. See also, Briggs *v.* Partridge, 64 N. Y. 357, 362; Jemison *v.* Citizens' S. Bank, 122 N. Y. 135, 143.) As between himself and the other party, he is liable as principal to the same extent as if he had not been acting for another. It is impossible in such circumstances to hold that the contract collapses for want of parties to sustain it. The contract tie cannot exist where there are not persons to be bound, but here persons were bound, and those the very persons intended. If Booth had given order in his own right and for his own benefit, but with the expectation of later assigning it to the plaintiff, that undisclosed expectation would not have nullified the contract. His undisclosed intention to act for a principal who was known to the defendant, was equally ineffective to destroy the contract in its inception.

If, therefore, the contract did not fail for want of parties to sustain it, the unsuspected existence of an undisclosed principal can supply no ground for the avoidance of a contract unless fraud is proved. We must distinguish between mistake such as we have been dis-

cussing, which renders the contract void *ab initio,* because the contractual tie has never been completely formed, and fraud, which renders it voidable at the election of the defrauded party. (Rodliff *v.* Dallinger, 141 Mass. 1, 6.) In the language of Holmes, J., in the case cited: "Fraud only becomes important as such when a contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it." If one who is in reality an agent denies his agency when questioned, and falsely asserts that his principal has no interest in the transaction, the contract, it may be, becomes voidable, not because there is a want of parties, but because it has been fraudulently procured. That was substantially the situation in Winchester *v.* Howard (97 Mass. 303). When such a case arises, we shall have to consider whether a misrepresentation of that kind is always so material as to justify rescission after the contract has been executed. (Leake on Contracts (6th ed.), pp. 19, 340.) But no such situation is disclosed in the case at hand. Booth made no misrepresentation to the defendant. He was not asked anything, nor did he say anything, about the plaintiff's interest in the transaction. Indeed, neither he nor the plaintiff's officers knew whether the defendant would refuse to deal with the plaintiff directly. They suspected hostility, but none had been expressed. The validity of the contract turns thus, according to the defendant, not on any overt act of either the plaintiff or its agent, but on the presence or absence of a mental state. We are asked to hold that a contract complete in form, becomes a nullity in fact because of a secret belief in the mind of the undisclosed principal that the disclosure of his name would be prejudicial to the completion of the bargain. We cannot go so far. (Stoddard *v.* Ham, 129 Mass. 383.) It is unnecessary, therefore, to consider whether, even if fraud were shown, the defendant, after the contract was executed, could be permitted to rescind without restoring the difference between the price received for the defective blocks and their reasonable value. It is also unnecessary to analyze the evidence for the purpose of showing that the defendant, after notice of the plaintiff's interest in the transaction, continued to make delivery, and thereby waived the objection that the contract was invalid. (Cincinnati S.-L. Ill. Gas Co. *v.* Western Siemens-L. Co., 152 U. S. 200, 202; Mudge *v.* Oliver, 1 Allen, 74.)

Other rulings complained of by the defendant have been considered, but no error has been found in them.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., Werner, Chase, Collin, Cuddeback and Hogan, JJ., concur.

Judgment affirmed.[1]

[1] In Werlin *v.* Equitable Surety Co. 227 Mass. 157, it was held that an individual person cannot maintain an action against a surety company on a bond in which the obligee is described only as the "New Boston Biscuit Company, corporation of

MARY ANN WILLIAMS *v.* WILLIAM CARWARDINE

In the King's Bench, April 18, 1833

[*Reported in* 4 *Barnewall & Adolphus,* 621]

Assumpsit to recover 20*l.*, which the defendant promised to pay to any person who should give such information as might lead to the discovery of the murder of Walter Carwardine. Plea, general issue. At the trial before Park, J., at the last Spring Assizes for the county of Hereford, the following appeared to be the facts of the case: One Walter Carwardine, the brother of the defendant, was seen on the evening of the 24th of March, 1831, at a public house at Hereford, and was not heard of again till his body was found on the 12th of April in the river Wye, about two miles from the city. An inquest was held on the body on the 13th of April and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates but did not give them any information which led to the apprehension of the real offender. On the 25th of April the defendant caused a handbill to be published, stating that whoever would give such information as should lead to a discovery of the murder of Walter Carwardine, should, on conviction, receive a reward of 20*l.*; and any person concerned therein, or privy thereto (except the party who actually committed the offence), should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made, to William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the Summer Assizes, 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one Williams; and on the 23d of August, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant to give evidence, the law would not imply a contract by the defendant to pay her the 20*l.* The learned Judge was of opinion,

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Malden, Massachusetts," where the plaintiff testifies that there was no such corporation as the New Boston Biscuit Company in existence, and the defendant's agent, who executed the bond for it, testifies that acting for the defendant he believed at the time of the execution and delivery of the bond that the surety company was making a contract with a Massachusetts corporation and not with the plaintiff individually, and that, if he had been informed that the New Boston Biscuit Company did not exist as a corporation but that the plaintiff individually was the proprietor of the business mentioned in the bond, he would not have executed the bond in behalf of the defendant, at least not without further investigation, and where it also appears that the defendant was not informed until the action was brought that the plaintiff claimed to be the obligee named in the bond; there being no evidence of a contract between the plaintiff and the defendant.

that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the 20*l.* was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of 20*l.* That promise could only be enforced in favor of persons who should have been induced to make disclosures by the promise of the reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

Denman, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

Littledale, J. The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

Parke, J. There was a contract with any person who performed the condition mentioned in the advertisement.

Patteson, J. I am of the same opinion. We cannot go into the plaintiff's motives. *Rule refused.*[1]

GIBBONS *v.* PROCTOR

In the Queen's Bench Division, April 22, 1891

[*Reported in* 64 *Law Times, New Series,* 594]

Motion to set aside a nonsuit.

Day, J. This action is brought to recover a reward, which the defendant advertised as payable to the person who should prosecute to conviction the perpetrator of a certain crime. The facts are simple. The defendant published on the 29th May a handbill, in which he stated that he would give 25*l.* to any person who should give information leading to the conviction of the offender in question, such information to be given to a superintendent of police of the name of Penn. The plaintiff is a police officer, and, in the early morning of the 29th May, the day of the afternoon of which the bill

[1] It may be inferred from the report of the case at *nisi prius* in 5 C. & P. 566 that the plaintiff knew of the offer of reward when she gave the requested information.

was published, communicated important information which led to the conviction of the offender to a comrade and fellow policeman called Coffin, telling Coffin, as his agent, to carry the information to the proper authority. Coffin, in accordance with the rules of the force, first informed his superior officer, Inspector Lennan, and Lennan sent on the information to Superintendent Penn. Both Coffin and Lennan were the agents of the plaintiff to carry on a message set going by him, and it reached Penn at a time when he had notice that the person sending him such information was entitled to the reward of 25*l.* The condition was fulfilled after the publication of the hand-bill and the announcement therein contained of the defendant's offer of the reward to the informant.

LAWRENCE, J. I entirely agree.

Nonsuit set aside, and verdict entered for the plaintiff for 25l.[1]

JOHN VITTY, APPELLANT, *v.* THOMAS ELEY, TRUSTEE OF SCHOOL DISTRICT, No. 16

APPELLATE DIVISION OF NEW YORK SUPREME COURT, April TERM, 1900

[*Reported in* 51 *New York, Appellate Division,* 44]

SPRING, J.: The defendant is trustee of a school district in the town of Lockport. In January, 1899, the schoolhouse in this district was broken into by one Joe White, and a quantity of property stolen therefrom or destroyed. The trustee, probably by authority of the citizens of the district, although his authority is not in question, offered a reward of twenty-five dollars "for the arrest and conviction of the party or parties" who perpetrated the crime. The evidence shows that White and the plaintiff lived together and were cronies. White, after breaking into the schoolhouse in the night, returned to the plaintiff's house bringing with him chalk, flags, window catches, and other stuff which he had taken from the schoolhouse. He also had two chickens, evidently stolen, which were eaten in the household. The plaintiff saw White burn two of these flags and secrete the other stuff under a board of the floor. White told the plaintiff not to "say anything about this." The testimony, therefore, shows that the plaintiff knew that White had stolen this stuff. Later on, after the reward and with notice of it, he testified that he told the bartender in the saloon of Mahar & Byrnes that Joe White broke into the schoolhouse; that Peter Hayes, who was working up the case, was called in from the back room and the plaintiff then volun-

[1] Eagle *v.* Smith, 4 Houst. 293; Dawkins *v.* Sappington, 26 Ind. 199; Auditor *v.* Ballard, 9 Bush, 572; Coffey *v.* Commonwealth (Ky.), 37 S. W. Rep. 575; Russell *v.* Stewart, 44 Vt. 170, *acc.* See also Drummond *v.* United States, 35 Ct. Claims, 356.

and offers makes that promise under the sole inducement
coercion, such as his, or by

tarily told him what he had seen, incriminating White. Hayes contradicted the plaintiff and said he was called from the back room, and the following occurred: "I said, 'I want you to come up to the sheriff's office and make a statement as to what you know about breaking into this schoolhouse.' He says, 'I don't know anything about it; I was home in bed the night the schoolhouse was broken into.' I said 'From what I hear, either you or Joe or both of you went into that schoolhouse.' He said, 'I didn't go in there.' I said, 'If you don't come up to the sheriff's office and tell what you know about it, I will swear out a warrant against you.' He said that if he told what he knew about it, he would have no place to stay. I said, 'I will find you a place to stay, come with me,' and went to the courthouse and called the sheriff out. I said, 'This man will make a statement.' We went into a side room. He said about what he testified this forenoon." If his version of the transaction is correct, the plaintiff did not voluntarily give up this information with the expectation of obtaining the reward, but it was extorted from him through fear that he might be arrested himself for complicity with White.

There is considerable contrariety in the decisions as to the real basis of the right to a reward. It, however, seems to be settled in this State that it is in the nature of a contract inuring to the benefit of the person who gives the information. A few principles out of the conflicting cases I think may be stated, although there is no uniformity among them.

1. The information must be given with knowledge of the reward. Fitch *v.* Snedaker, 38 N. Y. 248; Howland v. Lounds, 51 id. 604.[1]

I think the evidence warrants the conclusion that plaintiff knew of the reward, although it is a little shadowy, for apparently he could not read.

2. As I have suggested, it is a contract obligation. This being so, it must be the voluntary giving up of the information by the person. If cork-screwed out of him by threats inducing fear of prosecution, I take it no recovery could be had. That would destroy the contract element. In the early English case of Williams *v.* Carwardine (4 Barn. & Ald. 621) the question of the motive was held to be unimportant, but the text writers and American authorities do not seem to have followed this doctrine strictly, although I find no case in this State distinctly overruling it. That case cannot be good law

[1] Morrell *v.* Quarles, 35 Ala. 544; Wilson *v.* Stump, 103 Cal. 255; Chicago, &c. R. R. Co. *v.* Sebring, 16 Ill. App. 181; Ensminger *v.* Horn, 70 Ill. App. 605; Williams *v.* West Chicago St. Ry. Co., 191 Ill. 610; Lee *v.* Flemingsburg, 7 Dana, 28 (overruled); Ball *v.* Newton, 7 Cuch. 599; Forsythe *v.* Murnane, 113 Minn. 181; Smith *v.* Vernon County, 180 Mo. 501; Mayor of Hoboken *v.* Bailey, 36 N. J. L. 490; Fitch *v.* Snedaker, 38 N. Y. 248; Sheldon *v.* George, 132 N. Y. App. D. 470; Stamper *v.* Temple, 6 Humph, 113; Broadnax *v.* Ledbetter, 100 Tex. 375 *acc.* See also City Bank *v.* Bangs, 2 Edw. Ch. 95; Brecknock School District *v.* Frankhouser, 58 Pa. 380. Compare Taft *v.* Hyatt, 105 Kans. 35; Choice *v.* Dallas, (Tex. Civ. App.) 210 S. W. Rep. 753.

if the liability is contractual, as assent and a voluntary surrender of the information would be essential.

3. The authorities hold that the information must be imparted with a view to obtaining the reward. 18 Encyc. of Pl. & Pr. 1155; Hewitt *v.* Anderson, 56 Cal. 476. And in Holland *v.* Lounds (*supra*) the court says, at page 609: "That a party claiming a reward of this character must give some information or do something having some reference of the reward offered, is very obvious. The action is, in fact, upon contract. Where a contract is proposed to all the world, in the form of a proposition, any party may assent to it, and it is binding, but he cannot assent without knowledge of the proposition."

In the present case the plaintiff does not claim that there was any talk between him and Hayes to the effect that he expected any reward. The information given by the plaintiff was undoubtedly valuable, and even essential to secure the conviction of White. The justice, however, on conflicting evidence, or upon inferences properly deducible from the evidence, has decided adversely to the plaintiff. This decision implies that he reached the conclusion that the information was imparted through fear of arrest, or without any expectation of receiving the reward. The conclusion is supported by the proofs, and we are not inclined to interfere with the disposition of the case made by the justice.

The Judgment is affirmed, with costs to the respondent.

JAMES WILLIAMS *v.* THE WEST CHICAGO STREET RAILWAY CO.

Illinois Supreme Court, October 24, 1901

[*Reported in* 191 *Illinois,* 610]

Mr. Justice Hand delivered the opinion of the Court:—

This is an action of assumpsit brought by the appellant, against the appellee, in the Circuit Court of Cook County, to recover a reward offered by the appellee for the arrest and conviction of the murderer or murderers of C. B. Birch, who was killed while in the service of the appellee, which as published, was in the following terms:—

"$5,000 Reward.

"Office West Chicago Street Railroad Co.,
"June 24, 1895.

"The above reward will be paid by the West Chicago Street Railroad Company for the arrest and conviction of the murderer or murderers of C. B. Birch, who was fatally shot while in discharge of his duty as receiver, on the morning of June 23, at the Armitage Avenue barn.

"Charles T. Yerkes, *Pres't.*"

At the close of all the evidence the Court directed the jury to find the issues for the defendant, which was accordingly done, and a judgment having been rendered on said verdict, which judgment has been affirmed by the Appellate Court for the First District, a further appeal has been prosecuted to this Court.

At about two o'clock on Sunday morning, June 23, 1895, Birch, whose duty it was to receive the money brought in by the conductors, was fatally shot at the barn of appellee located at Armitage Avenue, in the city of Chicago. The appellant, who was also an employee of the appellee, and whose duty consisted of going from barn to barn each night to inspect the cash registers, was in the barn from midnight until two o'clock in the morning, and left just before the killing of Birch. As he drove away in his buggy he noticed two men coming across the street toward the barn. They looked sharply at him and he looked at them. On Monday morning, June 24, the appellant went to the appellee's office, where he met his general superintendent, who inquired of him if he saw any men near the barn as he drove away. Appellant told him that he had seen two men and that he thought he could identify them, whereupon the superintendent gave him a note and told him to go and see Captain Larson of the police force. He called upon Captain Larson that afternoon, told him what he had seen and gave him a description of the two men, whereupon the officer said that he had a man in custody at that time who he thought answered the description of one of the men described by him. The man, whose name was Julius Mannow, was brought up and was identified by the appellant as one of the men he had seen near the barn as he drove away. Captain Larson told him to come to the station the next day, and in the meantime he would hunt up and have arrested the other man he had described. The murder of Birch led the police authorities to at once issue what was termed a "drag-net order," — that is, an order to the various patrolmen to arrest all suspicious characters in their respective districts and bring them in for examination as to their whereabouts at the time of the commission of the crime. Mannow was thus arrested and brought to the station. A police officer named Jurs testified upon the trial of this cause that about two months before the time of the murder Mannow had narrated to him a plan for the robbing of a coal office in the manner in which the Armitage Avenue robbery was accomplished, and had described Joseph Windrath as concerned in the plan, and that after the Armitage Avenue robbery and the murder of Birch the witness at once recalled this fact and suspected Mannow and Windrath and took steps to cause their arrest. This was before the information was given by the appellant. On Tuesday morning, the 25th day of June, the appellant for the first time learned of the offered reward by reading the same as published in the "Chicago Tribune." Afterwards, on that day, he went again to the police station and identified Windrath, who had been arrested in the meantime, as the man he

had seen in company with Mannow near the barn just before the killing. The services rendered by the appellant in connection with the arrest and conviction of Mannow and Windrath after he knew of the offered reward, consisted in his identification of Windrath, and his testifying before the coroner's jury, the grand jury, and upon the trial in the criminal court, that he had seen Mannow and Windrath together near the Armitage Avenue barn on the night and near the time of the commission of the crime. Other information was obtained by the police authorities shortly after the identification of Mannow and Windrath which fastened the crime upon the two men. Mannow pleaded guilty and Windrath was tried and convicted. The offered reward was paid by the appellee to another claimant.

The offer of a reward remains conditional until it is accepted by the performance of the service, and one who offers a reward has the right to prescribe whatever terms he may see fit, and such terms must be substantially complied with before any contract arises between him and the claimant. Thus, if the reward is offered for the arrest and conviction of a criminal, or for his arrest and the recovery of the money stolen, both the arrest and conviction or arrest and recovery of the money are conditions precedent to the recovery of the reward; and when the offer is for the delivery of a fugitive at a certain place the reward cannot be earned by the delivery of him at another place, and an offer for a capture of two is not acted upon by the capture of one. The reward cannot be apportioned. The offer is an entirety, and as such must be enforced, or not at all. 21 Am. & Eng. Ency. of Law, 1st ed., 391–397; Hogan *v.* Stophlet, 179 Ill. 150; Furman *v.* Parke, 21 N. J. L. 310; Fitch *v.* Snedaker, 38 N. Y. 248; Juniata County *v.* McDonald, 122 Pa. St. 115; Shuey *v.* United States, 92 U. S. 73.

In Hogan *v.* Stophlet, *supra*, which was an action for the recovery of a reward offered for the "apprehension and conviction of a criminal," this Court said (p. 153): "The reward was offered for the apprehension and conviction of the person or persons who burned or caused the building to be burned. It thus appears that the reward was offered, not for the conviction alone, but for the apprehension *and* conviction of the guilty party. Appellant is entitled to recover for both or he cannot recover at all. The reward cannot be apportioned, — that is to say, there can be no apportionment of it between what is due for the apprehension and what is due for the conviction. The offer must be enforced as an entirety, or not at all."

In Furman *v.* Parke, *supra*, the reward was "for the apprehension and conviction of such person or persons as may have been implicated in the murder of John B. Parke, John Castner, Maria Castner and child." The Court say: "The reward is to be paid for the apprehension and conviction, not of one of several persons implicated, but of the person (if one) or the persons (if more than one) who were implicated, not in the murder of John B. Parke alone, but

of John B. Parke and three other persons. . . . The person, therefore, to be entitled to the reward, must aver and prove that the person or persons implicated in each of the four murders has or have been apprehended and convicted."

In Fitch *v.* Snedaker, 38 N. Y. 248, the offer was "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder," etc. It appeared that the claimant gave evidence which led to the conviction of the offender but did nothing towards securing his discovery or arrest, and it was held that he was not entitled to the reward. The Court said (p. 250): "It is entirely clear that in order to entitle any person to the reward offered in this case he must give such information as shall lead to both apprehension and conviction — that is, both must happen, and happen as a consequence of information given. No person could claim a reward whose information caused the apprehension, until conviction followed. Both are conditions precedent. No one could therefore claim the reward who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that had the information been concealed or suppressed there could have been no conviction. This is according to the plain terms of the offer of the reward."

In Juniata County *v.* McDonald, *supra,* the reward was for the capture and delivery of a criminal to the jail, and a person who furnished information from which the capture resulted, but who did not deliver the prisoner or cause him to be delivered, was held not to be entitled to the reward. The Court said: "A mere reading of this paper settles the whole controversy. The reward was not offered for information as to the prisoner's whereabouts, but for his capture and delivery. How, then, could one be entitled to that reward who neither captured nor delivered him? Admitting, then, that the plaintiff gave the sheriff accurate information as to where the culprit could be found, and that he went with him and acted as one of his posse, yet on that officer fell the duty of arrest and the plaintiff was relieved of all responsibility."

And in Shucy *v.* United States, *supra,* which was a suit for a reward offered by the Secretary of War "for the apprehension of John H. Surratt, one of Booth's accomplices," it was held that one who had made disclosures to which were due the discovery and arrest of Surratt was not entitled to the reward for his apprehension. The Court say: "It is found as a fact that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in

this case there were, intermediate agencies. Other persons than the claimant made the arrest — persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were."

Under the authorities above cited the appellant cannot recover unless the evidence shows he caused the arrest and conviction of both Mannow and Windrath. He did neither. At most he furnished some information to the police which led to the arrest of Windrath, and identified both men as having been in the vicinity of the barn at the time of the commission of the crime, which does not bring him within the terms of the offered reward, which was for "the arrest and conviction of the murderer or murderers of C. B. Birch."

We are of the opinion that the appellant is not entitled to recover in this case for the further reason that the services performed by him were substantially all rendered before the reward was offered or at a time when he was ignorant of the fact that a reward had been offered. After the appellant had informed the superintendent of appellee and the captain of police that he had seen Mannow and his companion near the scene of the murder at about the time the same was committed, he did nothing towards securing the conviction of the prisoners other than what he could have been required to do as a witness. The reward was not offered for information which was already in the possession of the officers nor for witnesses who would come forward and testify to facts which were then known to be within their knowledge, but for the arrest and conviction of the murderer or murderers. The right to recover a reward arises out of the contractual relation which exists between the person offering the reward and the claimant, which is implied by law by reason of the offer on the one hand and the performance of the service on the other, the reason of the rule being that the services of the claimant are rendered in consequence of the offered reward, from which an implied promise is raised on the part of the person offering the reward to pay him the amount thereof by reason of the performance by him of such service, and no such promise can be implied unless he knew at the time of the performance of the service that the reward had been offered, and in consideration thereof, and with a view to earning the same, rendered the service specified in such offer. Fitch *v.* Snedaker, *supra;* Howlands *v.* Lounds, 51 N. Y. 604; Stamper *v.* Temple, 6 Humph. (Tenn.) 113; 44 Am. Dec. 296.

In Stamper *v.* Temple, *supra,* which was an action to recover the amount of a reward, the Court say: "To make a good contract there must be an *aggregatio mentium,* — an agreement on the one part to give and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered?"

In Fitch *v.* Snedaker, *supra,* on the trial several questions were asked of the plaintiff, who was a witness in his own behalf, relative

to the person to whom he gave information in relation to the murder before the reward was offered or before he heard of it. The Court sustained objections thereto and excluded the evidence. The ruling of the trial court in this regard on appeal was held to be correct, and the Court on page 251 say: "The form of action in all such cases is assumpsit. The defendant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties? To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. . . . Without that there is no contract. How, then, can there be consent or assent to that of which the party has never heard? . . . The offer could only operate upon plaintiffs after they heard of it."

And in Howlands *v.* Lounds, *supra,* the Court say (p. 605): "In order to entitle a party to recover a reward offered, he must establish between himself and the person offering the reward, not only the offer and his acceptance of it, but his performance of the services for which the reward was offered; and upon principle, as well as upon authority, the performance of this service by one who did not know of the offer and could not have acted in reference to it cannot recover."

We are of the opinion the appellant failed to make out a cause of action, and that the trial court, for the reasons above suggested, properly directed a verdict for the appellee. The judgment of the Appellate Court will therefore be affirmed. *Judgment affirmed.*

OFFORD *v.* DAVIES AND ANOTHER

IN THE COMMON PLEAS, June 2, 1862

[*Reported in* 12 *Common Bench Reports, New Series,* 748]

THIS was an action upon a guaranty. The first count of the declaration stated, that by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following, that is to say: "We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee *for the space of twelve calendar months* the due payment of all such bills of exchange, to the extent of 600*l.* And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys." Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within

the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishonored; and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit; and that all things had happened and all times had elapsed necessary, &c.; yet that the defendants broke their said promise, and did not pay to the plaintiff, or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof; whereby the sums payable by the said bills of exchange so dishonored as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys, if the said bills had been duly paid at maturity.

Fourth plea, to the first count, — so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange, and the said sums so advanced, — that, after the making of the said guaranty, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guaranty, and requested the plaintiff not to discount such bills of exchange, and not advance such moneys.

To this plea the plaintiff demurred; the ground of demurrer stated in the margin being "that the fourth plea offers no defence to that part of the declaration to which it is pleaded, for that a party giving a guaranty [for a definite period] has no power to countermand it without the assent of the person to whom it is given." Joinder.

Prentice (with whom was *Brandt*), in support of the demurrer. A guaranty like this, to secure advances for twelve months, is a contract which cannot be rescinded or countermanded within that time without the assent of the person to whom it is given. [BYLES, J. What consideration have these defendants received?] For any thing disclosed by the plea, the plaintiff might have altered his position in consequence of the guaranty, by having entered into a contract

with Davies & Co., of Newtown, to discount their bills for twelve months. In Calvert *v.* Gordon, 1 M. & R. 497, 7 B. & C. 809, 3 M. & R. 124, it was held that the obligor of a bond conditioned for the faithful service of A. whilst in the employ of B. cannot discharge himself by giving notice that after a certain period he will be no longer answerable; nor can the personal representative of the obligor discharge himself by such a notice.[1] Lord Tenterden, in giving judgment in that case, says (3 M. & R. 128): "The only question raised by the defendant's second plea is, whether it is competent to the surety to put an end to his liability by giving a notice which is to take effect from the very day on which it is given. It would be a hardship upon the master if this could be done. It is said that it would be a hardship on the surety if this liability must necessarily continue during the whole time that the principal remains in his service; but, looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability after a specified time, after notice given. This he has not done." Here, the defendants *have* stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving them from that bargain? [Byles, J. Suppose a man gives an open guaranty, with a stipulation that he will not withdraw it, — what is there to bind him to that?] If acted upon by the other party, it is submitted that that *would* be a binding contract. Hassell *v.* Long, 2 M. & Selw. 363, is an authority to the same effect as Calvert *v.* Gordon.

E. James, Q. C. (with whom was *T. Jones*), contra. The cases upon bonds for guaranteeing the honesty of clerks or servants are inapplicable: there the contract attaches as soon as the clerk or servant enters the service, and it is not separable. This, however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount. This is more like the *mandatum pecuniæ credendæ* treated of by Pothier — on Obligations, Part II. c. 6, § 8, art. 1. If so, it is subject to all incidents of a mandate or authority. [Willes, J. *Mandatum* does not mean a bare authority which may be revoked.] . . . A mutual agreement to rescind can only be necessary where there is a mutual contract. But, in a case like this, where there is no complete contract until something is done by the mandatory, the assent of both parties cannot be required. Suppose Davies & Co., of Newtown, had become notoriously insolvent, would the defendants continue bound by their guaranty, if the plaintiffs, with notice of that fact, chose to go on discounting for them? [Williams,

[1] And see Gordon *v.* Calvert, 2 Sim. 253, 4 Russ. 581, where an injunction to restrain proceedings at law upon the bond was dissolved.

J. Suppose I guarantee the price of a carriage, to be built for a third party who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent, — may I recall my guaranty?] Not after the coach-builder has commenced the carriage. [ERLE, C. J. Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted.] In an American work of considerable authority, Parsons on Contracts, p. 517, it is said, "A promise of guaranty is always revocable, at the pleasure of the guarantor, by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount, and, after a part has been delivered, the guaranty is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount; or unless the seller has, in reliance on the guaranty, not only delivered a part to the buyer, but bound himself by a contract, enforceable at law, to deliver the residue." Brocklebank *v.* Moore, cor. Abbott, C. J., Guildhall Sittings after Trinity Term, 1823, referred to in 2 Stark. Evid., 3d edit. 510, n., is a direct authority that "a continuing guaranty is countermandable by parol." And the same principle is clearly deducible from Mason *v.* Pritchard, 12 East, 227. [WILLIAMS, J. That would have been applicable, if this had been a guaranty for 600*l.*, with no mention of the twelve calendar months.] The mention of twelve months would not compel the plaintiff to go on discounting for that period. In Holland *v.* Teed, 7 Hare, 50, under a guaranty given to a banking-house consisting of several partners, for the payment of such bills drawn upon them by one of their customers as the bank might honor, and any advances they might make to the same customer, within a certain time, it was held that the guaranty ceased upon the death of one of the partners in the bank before the expiration of the time to which the guaranty was expressed to extend; that bills accepted before the death of the partner, and payable afterwards, were within the guaranty; and that the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although such amount might be diminished by such act. [BYLES, J. The case of a change in the firm is now provided for by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, § 4. ERLE, C. J. What meaning do you attribute to the words "at our request" in this guaranty?] As and when we request. The notice operated a retractation of the request, and any discount which took place after that notice was not a discount at the request of the defendants.

Brandt, in reply. The Court of Exchequer have decided in this

term, in a case of Bradbury *v.* Morgan,[1] that the death of the surety does not operate a revocation of a continuing guaranty. If that be so, it is plain that the guaranty is not a mere *mandatum,* but a contract. In Gordon *v.* Calvert, 2 Sim. 253, 4 Russ. 581, the executrix of the deceased surety gave notice to Calvert & Co., the obligees, that she would no longer consider herself liable on the bond; but the Vice-Chancellor (Sir L. Shadwell) said, that, "by the original contract, the liability of the surety was to continue as long as Calvert & Co. kept Richard Edwards, or he chose to remain in their service; that after Calvert & Co. had received the plaintiff's letter they never gave her any intimation that they did not consider her as continuing liable under her husband's bond; that their conduct did not operate in any manner upon her; and that therefore the injunction ought to be dissolved." That shows that, in the opinion of that learned Judge, the assent of the three persons concerned and interested in the bargain would be requisite to its dissolution. The fourth plea does not allege that notice of revocation was given before any bills had been discounted by the plaintiffs. It must therefore be assumed that some discounts had taken place. [*T. Jones.* The fact undoubtedly is so.]

Cur. adv. vult.

Erle, C. J., now delivered the judgment of the Court.

The declaration alleged a contract by the defendants, in consideration that the plaintiff would, at the request of the defendants, discount bills for Davies & Co., not exceeding 600*l.*, the defendants promised to guarantee the repayment of such discounts *for twelve months,* and the discount, and no repayment. The plea was a revocation of the promise before the discount in question; and the demurrer raised the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that, consequently, the plea is good.

This promise by itself creates no obligation.[2] It is in effect conditioned to be binding if the plaintiff acts upon it, either to the

[1] Since reported, 31 Law J. Exch. 462; [1 H. & C. 249]. There the guaranty was in the following terms: "Messrs. Bradbury & Co., — I request you will give credit in the usual way of your business to H. L.; and, in consideration of your doing so, I do hereby engage to guarantee the regular payment of the running balance of his account with you, *until I give you notice to the contrary,* to the extent of 100*l.*;" and it was held, that the liability was not determined by the death of the surety, but that his executors were liable to Bradbury & Co. for goods sold and credit given to H. L. subsequently to the surety's death, — on the ground (contrary to the doctrine laid down in Smith's Mercantile Law, 4th edit. 425, 6th edit. 477, and adopted in Williams on Executors, 5th edit. 1604) that the guaranty was a *contract* to be answerable to the extent stipulated for credit given to the principal debtor, until the creditors should receive a notice to put an end to it. — Rep.

[2] "A great number of cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guaranty falls under that class; when a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the

benefit of the defendants or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guaranty for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that the same discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and after repayment leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.

CHARLES A. BISHOP *v.* FRANK H. EATON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 13–June 19, 1894

[*Reported in* 161 *Massachusetts,* 496]

CONTRACT, on a guaranty. Writ dated February 2, 1892. Trial in the Superior Court without a jury, before BRALEY, J., who found the following facts.

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In December, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid."

On January 7, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid, and properly addressed to the defendant at his home in Nova Scotia. The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its pay-

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guaranty; but if he do employ him, then the guaranty attaches and becomes binding on the party who gave it." Parke, B., Kenneway *v.* Treleavan, 5 M. & W. 498, 501. "Suppose I say, if you will furnish goods to a third person, I will guarantee the payment: there you are not bound to furnish them; yet if you do furnish them in pursuance of the contract, you may sue me on my guaranty." Patteson, J., Morton *v.* Burn, 7 Ad. & El. 19, 23.

ment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them, the plaintiff asked the defendant to take up the note still outstanding, and pay it, to which the defendant replied: "Try to get Harry to pay it. If he don't, I will. It shall not cost you anything."

On October 1, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22, 1891.

The judge ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.[1]

F. G. Cook, for the defendant.

R. W. Light, for the plaintiff.

KNOWLTON, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent contract or a guaranty. The judge found that the plaintiff signed the note relying upon the letter, "and looked to the defendant solely for reimbursement if called upon to pay the note." The promise contained in the letter was in these words: "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise, the plaintiff was authorized to adopt the first alternative, and to let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity or he might adopt the second alternative and assist him to get money from some one else in such a way as to create a debt from Harry to the person furnishing the money, and, if Harry failed to pay, might look to the defendant to relieve him from the liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or to such other persons as should furnish the money, and that the defendant was to guarantee the payment of it. We are therefore of opinion, that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon

[1] The defendant's requests for rulings are omitted.

the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. Babcock *v.* Bryant, 12 Pick. 133 Whiting *v.* Stacy, 15 Gray, 270 Schlessinger *v.* Dickinson, 5 Alen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the

plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.

The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defence that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. This rule in cases like the present was established in Massachusetts in Vinal *v.* Richardson, 13 Allen, 521, after much consideration, and it is well founded in principle and strongly supported by authority.

We find one error in the rulings which requires us to grant a new trial. It appears from the bill of exceptions that when the note became due the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it. Chace *v.* Brooks, 5 Cush. 43; Carkin *v.* Savory, 14 Gray, 528. The Court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence if he had considered it, we have no means of knowing.

Exceptions sustained.[1]

DUNLOP *v.* HIGGINS

IN THE HOUSE OF LORDS, February 21, 22, 24, 1848

DUNLOP AND OTHERS, *Appellants*
VINCENT HIGGINS AND OTHERS, *Respondents*

[*Reported in* 1 *House of Lords Cases,* 381]

THIS was an appeal against a decree of the Court of Session, made under the following circumstances: Messrs. Dunlop & Co. were iron masters in Glasgow, and Messrs. Higgins & Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop

[1] The authorities upon the question whether notice of acceptance is necessary to the formation of a contract of guaranty are collected in Ames's Cases on Suretyship, 225, note 2; 1 Williston, Contracts, §§ 69, 69a. The different reasons given in the decisions, holding notice necessary, are considered in Ames, 230, 231 and notes and in Williston, *loc. cit.*

respecting the price of iron, and received the following answer: "Glasgow, 22d January, 1845. We shall be glad to supply you with 2000 tons, pigs, at 65 shillings per ton, net, delivered here." Messrs. Higgins wrote the following reply: "Liverpool, 25th January, 1845. You say 65*s.* net, for 2000 tons pigs. Does this mean for our usual four-months' bill? Please give us this information in course of post, as we have to decide with other parties on Wednesday next." On the 28th Messrs. Dunlop wrote, "Our quotation meant 65*s.* net, and not a four-months' bill." This letter was received by Messrs. Higgins on the 30th of January, and on the same day, and by post, but not by the first post of that day, they despatched an answer in these terms: "We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms hence the delay." This letter was dated "31st January." It was not delivered in Glasgow until 2 o'clock P.M. on the 1st of February, and, on the same day, Messrs. Dunlop sent the following reply: "Glasgow, 1st February, 1845. We have your letter of *yesterday,* but are sorry that we cannot now enter the 2000 tons pig-iron, our offer of the 28th not having been accepted in course." Messrs. Higgins wrote on the 2d February to say that they had erroneously dated their letter on the 31st January, that it was really written and posted on the 30th, in proof of which they referred to the post-mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before eight o'clock in the morning of the 30th of January, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock P.M. on that day. A letter so despatched would be due in Glasgow at two o'clock P.M. on the 31st of January; another post left Liverpool for Glasgow every day at one o'clock A.M., and letters to be despatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of the 1st of February. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow

at two o'clock P. M. of Saturday, the 1st of February (at which time Messrs. Higgins' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.[1]

Mr. *Bethell* and Mr. *Anderson,* for the appellants.

Mr. *Stuart Worthley* and Mr. *Hugh Hill,* for the respondents, were not called on.

THE LORD CHANCELLOR.[2] The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date the 31st of January. A proposition had been made by the Glasgow house of Dunlop, Wilson, & Co., to sell 2,000 tons of pig-iron. The answer is of that date of the 31st of January: "Gentlemen, we will take the 2,000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2,000 tons of pigs. To that letter there is annexed a postscript in which they say, "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

That, my Lords, therefore, is an unconditional acceptance, by the letter dated the 31st of January, which was proved to have been put into the post-office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on the 30th of January, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February.

The first question raised by the first exception applies not to the summing up of the learned Judge, but to the admission of evidence by him.

My Lords, the exception states, "that the pursuers having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders being admitted to be dated on the 31st of January, and received in Glasgow by the mail which in due course ought to bring the Liverpool letters of the 31st, but not Liverpool letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date the 31st of January was written and despatched from Liverpool on the 30th, and prevented by accident from reaching

[1] The statement of the proceedings in the lower courts have been omitted.
[2] Lord Cottenham. Portions of the opinion are omitted.

Glasgow in due course, especially as it is not alleged that the defenders were aware (previous to the 3rd of February) of any such accident having occurred."

The exception is that the learned Judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade, an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive, if that is the right construction of the direction of the learned Judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract: as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance — the post-office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so

decided in cases in England, and none has been cited from Scotland which controverts that proposition; but the cases in England put it beyond all doubt. It is not disputed — it is a very frequent occurrence — that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not, is a matter quite immaterial, because for accidents happening at the post-office he is not responsible.

My Lords, the case of Stocken *v.* Collin[1] is precisely a case of that nature, where the letter did not arrive in time. In that case Baron Parke says, "It was a question for the jury whether the letter was put into the post-office in time for delivery on the 28th. The post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in the delivery." Baron Alderson says, "The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk Circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the post-office is only the agent for the delivery of the notice was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of Adams *v.* Lindsell. That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer." Therefore he said, "before I received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had

[1] 7 Meeson & Welsby, 515.

retracted their offer by selling the wool to other persons." But the Court said, "If that were so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject. Common sense tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject, and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of Scotland appears to be the same as the law of England, for Mr. Bell's Commentary lays down the same rule as existing in Scotland, and nothing has been stated to us in contradiction of his opinion.

It was ordered that the interlocutor complained of should be affirmed with costs.[1]

[1] Adams *v.* Lindsell, 1 B. & Ald. 681; Potter *v.* Sanders, 6 Hare, 1; Dunlop *v.* Higgins, 1 H. L. C. 381; Duncan *v.* Topham, 8 C. B. 225; Hebb's Case, L. R. 4 Eq. 9; Harris's Case, L. R. 7 Ch. 589; Byrne *v.* Van Tienhoven, 5 C. P. D. 344; Grant *v.* Household Fire Ins. Co. 4 Ex. D. 216; Brogden *v.* Metropolitan Ry. Co., 2 App. Cas. 666; McGiverin *v.* James, 33 U. C. Q. B. 203; Tayloe *v.* Merchants' F. Ins. Co., 9 How. 390; Patrick *v.* Bowman, 149 U. S. 411; Winterport, &c. Co. *v.* The Jasper, 1 Holmes, 99; *Re* Dodge, 9 Ben. 482; Darlington Iron Co. *v.* Foote, 16 Fed. Rep. 646; Sea Ins. Co. *v.* Johnston, 105 Fed. Rep. 286, 291, (C. C. A.); Levisohn *v.* Waganer, 76 Ala. 412; Linn *v.* McLean, 80 Ala. 360; Kempner *v.* Cohn, 47 Ark. 519; Porter *v.* Gossell 112 Ark. 380; Mercer Elec. Mfg. Co. *v.* Connecticut Elec. Mfg. Co. 87 Conn. 691; Bryant *v.* Booze, 55 Ga. 438; Haas *v.* Myers, 111 Ill. 421; Chytraus *v.* Smith, 141 Ill. 231, 257; Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96; Moore *v.* Pierson, 6 Ia. 279; Ferrier *v.* Storer, 63 Ia. 484; Gipps Brewing Co. *v.* De France, 91 Ia. 108, 112; Chiles *v.* Nelson, 7 Dana, 281; Shaw *v.* Ingram-Day Lumber Co. 152 Ky. 329; Bailey *v.* Hope Ins. Co., 56 Me. 474; Emerson Co. *v.* Proctor, 97 Me. 360; Wheat *v.* Cross, 31 Md. 99; Lungstrass *v.* German Ins. Co., 48 Mo. 201; Lancaster *v.* Elliot 42 Mo. App. 503; Egger *v.* Nesbitt, 122 Mo. 667, 674; Horton *v.* New York Life Ins. Co., 151 Mo. 604; Abbott *v.* Shepard, 48 N. H. 14; Davis *v.* Ætna Mut. F. I. Co., 67 N. H. 218; Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Commercial In. Co. *v.* Hallock, 27 N. J. L. 645; Northampton, &c. Ins. Co. *v.* Tuttle, 40 N. J. L. 476; Maetier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp. 11 N. Y. 441; Trevor *v.* Wood, 36 N. Y. 307; Watson *v.* Russell, 149 N. Y. 388, 391; Wester *v.* Casein Co. 206 N. Y. 506; Hacheny *v.* Leary, 12 Ore. 40; Hamilton *v.* Lycoming M. I. Co., 5 Pa. St. 339; McClintock *v.* South Penn. Oil Co., 146 Pa. 144, 161; Otis *v.* Payne, 86 Tenn. 663; Blake *v.* Hamburg Bremen F. I. Co., 67 Tex. 160; Haarstick *v.* Fox, 9 Utah, 110; Durkee *v.* Vermont Central R. R. Co., 29 Vt. 127; Hartford Ins. Co. *v.* Lasher Stocking Co., 66 Vt. 439; Malloy *v.* Drumheller, 68 Wash. 106; Washburn *v.* Fletcher, 42 Wis. 152, *acc.* The only contrary decision not overruled seems to be McCulloch *v.* Eagle Ins. Co., 1 Pick. 278. The letter must, however, be properly directed and stamped. Pots *v.* Whitehead, 5 C. E. Green, 55; Britton *v.* Phillips, 24 How. Pr. 111; Blake *v.* Hamburg Bremen F. I. Co., 67 Tex. 160.

The case of *ex parte* Cote, L. R. 9 Ch. 27, seems to indicate that the English doctrine is based on the assumption that a letter when mailed is no longer within the control of the sender, and that where as in France the sender may reclaim his letter the contract should not be regarded as completed by the mailing of an acceptance.

HENTHORN *v.* FRASER

IN THE CHANCERY DIVISION, COURT OF APPEAL March 3, 26, 1892

[*Reported in* [1892] 2 *Chancery,* 27]

IN 1891 the plaintiff was desirous of purchasing from the Huskisson Benefit Building Society certain houses in Flamank Street, Birkenhead. In May he, at the office of the society in Chapel Street, Liverpool, signed a memorandum drawn up by the secretary, offering £600 for the property, which offer was declined by the directors; and on the first of July he made in the same way an offer of £700, which was also declined. On the 7th of July he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows: —

"I hereby give you the refusal of the Flamank Street property at £750 for fourteen days."

The secretary, after signing this, handed it to the plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding it if the society found that they could not withdraw from the offer to the plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the plaintiff, who resided in Birkenhead, the following letter: —

"Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, Flamank Street, Birkenhead, for £750, in fourteen days, is withdrawn, and the offer cancelled."

By the United States Postal Laws, §§ 531, 533, the sender of a letter may regain it by complying with required formalities. See also Crown Point Iron Co. *v.* Ætna Ins. Co., 127 N. Y. 608, 619. But in McDonald *v.* Chemical Nat. Bank, 174 U. S. 610, 620, the Court said; "Nor can it be conceded that except on some extraordinary occasion and on evidence satisfactory to the post-office authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a post-office, they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the parties to whom they are addressed. United States *v.* Pond, 2 Curtis, C. C. 265; Buell *v.* Chapin, 99 Mass. 594; Morgan *v.* Richardson, 13 Allen, 410; Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390."

If the use of the telegraph is authorized expressly or impliedly, the delivery of the acceptance to the telegraph office is held to complete the contract. Stevenson *v.* McLean, 5 Q. B. D. 346; Cowan *v.* O'Connor, 20 Q. B. D. 640; Minnesota Oil Co. *v.* Collier Lead Co., 4 Dill. 431; Garretson *v.* North Atchison Bank, 47 Fed. Rep. 867; Andrews *v.* Schreiber, 93 Fed. Rep. 369; Weld *v.* Victory Co. 205 Fed. Rep. 770; Bank of Yolo. *v.* Sperry Flour Co. 141 Cal. 314; Haas *v.* Myers, 111 Ill. 421, 427; Cobb *v.* Foree, 38 Ill. App. 255; Trevor *v.* Wood, 36 N. Y. 307; Perry *v.* Mt. Hope Iron Co., 15 R. I. 380. *Contra* is Beaubien Produce Co. *v.* Robertson, Rap. Jud. Quebec, 18 C. S. 429.

The question when a contract by mail or telegraph is completed has been much disputed in the civil law, and there are four or five theories each of which has adherents. See Valéry, Contrats par Correspondance, § 130 *seq.;* Windscheid, Pandektenrecht, II. § 306.

This letter, it appeared, was delivered at the plaintiff's address between 5 and 6 in the evening; but, as he was out, did not reach his hands till about 8 o'clock.

On the same 8th of July the plaintiff's solicitor, by the plaintiff's direction, wrote to the secretary as follows:—

"I am instructed by Mr. James Henthorn to write to you, and accept your offer to sell the property, 1 to 17 Flamank Street, Birkenhead, at the price of £750. Kindly have contract prepared and forwarded to me."

This letter was addressed to the society's office, and was posted in Birkenhead at 3.30 P.M., was delivered at 8.30 P.M. after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The plaintiff brought this action in the Court of the County Palatine for specific performance. The Vice-Chancellor dismissed the action, and the plaintiff appealed.

Farwell, Q. C., and *T. R. Hughes,* for the appeal.

Neville, Q. C., and *P. O. Lawrence,* for the defendant:—

We insist that the Vice-Chancellor has drawn a correct inference, — that there was no authority to accept by post; and if that be so, the acceptance will not date from the posting. Dunlop *v.* Higgins, 1 H. L. C. 381, went on the ground that it was the understanding of both parties that an answer should be sent by post. In Brogden *v.* Metropolitan Railway Company, Lord Blackburn puts it on the ground "that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted." It would be very inconvenient to hold the post admissible in all cases. Here, Liverpool and Birkenhead are at such a short distance from each other that it cannot be considered that the plaintiff had an authority to reply by post. If the offer had been sent by post that would, no doubt, be held to give an authority to reply by post; but the offer was delivered by hand to the plaintiff, who was in the habit of calling at the defendant's office, and lived only at a short distance, so that authority to reply by post cannot be inferred. The post is not prohibited; the acceptance may be sent in any way; but, unless sending it by post was authorized, it is inoperative till it is received. Suppose, immediately after posting the acceptance, the plaintiff had gone to the office and retraced it, surely he would have been free.

[LORD HERSCHELL. — It is not clear that he would, after sending an acceptance in such a way that he could not prevent its reaching the other party. Possibly a case where the question is as to the date from which an acceptance which has been received is operative may not stand on precisely the same footing as one where the question is whether the person making the offer is bound, though the acceptance has never been received at all. More evidence of au-

thority to accept by post may be required in the latter case than in the former.]

Dickinson *v.* Dodds, 2 Ch. D. 463, shows that a binding contract to sell to another person may be made while an offer is pending, and that it will be a withdrawal of the offer.

[Lord Herschell. — In that case the person to whom the offer was made knew of the sale before he sent his acceptance.]

Farwell, in reply.

1892, March 26. Lord Herschell.[1] If the acceptance by the plaintiff of the defendant's offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of Adams *v.* Lindsell, 1 B. & Al. 681, which was approved by the Lord Chancellor in Dunlop *v.* Higgins, 1 H. L. C. 381, 399, and also with the opinion of Lord Justice Mellish in Harris's case, Law Rep. 7 Ch. 587. The very point was decided in the case of Byrne *v.* Van Tienhoven, 5 C. P. D. 344, by Lord Justice Lindley, and his decision was subsequently followed by Mr. Justice Lush. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them, and not on the letter being posted. It cannot, of course, be denied, after the decision in Dunlop *v.* Higgins, 1 H. L. C. 381, in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendant's office at Liverpool. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the Household Fire and Carriage Accident Insurance Company *v.* Grant, 4 Ex. D. 216, Lord Justice Baggallay said (ibid. 227): "I think that the principle established in Dunlop *v.* Higgins is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." And in the

[1] Lord Herschell's restatement of the case is omitted. The concurring opinions of Lindley, L. J., and Kay, L. J., are also omitted.

same case Lord Justice Thesiger based his judgment, 4 Ex. D. 218, on the defendant having made an application for shares under circumstances "from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lord Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.[1] It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of Dickinson *v.* Dodds, 2 Ch. D. 463,

[1] In Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, an offer made in Boston in conversation was to "stand until the next day." The plaintiff telegraphed an acceptance from Providence. It was held that the contract was completed in Rhode Island. "If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial." See also Wilcox *v.* Cline, 70 Mich. 517.

was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed, and the usual decree for specific performance made. The respondents must pay the costs of the appeal and of the action.

IN RE LONDON AND NORTHERN BANK. EX PARTE JONES

IN THE CHANCERY DIVISION, November 15–17, 1899

[*Reported in* [1900] 1 *Chancery,* 220]

COZENS-HARDY, J.: On October 15, 1898, Dr. Jones, who resides at Sheffield, applied for 1000 ordinary shares of 10*l.* each in the company, upon which he paid a deposit of 500*l.*, being 10*s.* per share. His letter of application, with cheque enclosed, was received in due course by the company. On October 26 Dr. Jones wrote from Sheffield a letter withdrawing his application and asking for a return of his 500*l.* This letter of withdrawal was sent as a registered letter. It was delivered at the office of the company at about 8.30 on the morning of October 27 before the arrival of the secretary. On the afternoon of October 26 a board meeting of the company was held, at which it was resolved to allot 1000 shares to Dr. Jones. An allotment letter addressed to Dr. Jones, dated October 26, was delivered in Sheffield at about 7.30 in the evening of October 27. Dr. Jones now applies to have his name removed from the register in respect of the 1000 shares, and for a return of his deposit, on the ground that his application was withdrawn before notice of acceptance.

The company alleges that, although the notice of allotment did not reach Dr. Jones until the evening of the 27th, it was posted at or about 7.30 on the morning of the 26th, and therefore before the letter of withdrawal arrived. It is settled law that an offer is to be deemed accepted when the letter of acceptance is posted, the reason being that the post-office is considered the common agent of both parties. Harris's Case (1872), L. R. 7 Ch. 587. Hence, no delay on the part of the post-office in delivering the letter will be material. The withdrawal, in order to be effectual, must be before the offer is clinched by the posting of the letter of acceptance. The question I have to decide is this: Was the letter of allotment posted before the letter withdrawing the offer was received by the company? Now, the envelope containing the letter of allotment is produced. It bears a stamp impressed with the words "11 A.M., 27 Oct., '98," with the figures "44" below. It has been proved that this stamp indicates that the letter was not posted at the general post-office at all, but was deposited at one of the district post-offices in London,

from which letters are collected and taken to the general post-office. The letters thus collected are placed upon a separate bench or table, and this particular stamp is impressed on them. No work is done at this table until after 9.15. Letters posted at the general post-office are dealt with at a different table and are impressed with a different stamp. If the letter had been posted at 7.30 at the general post-office, it would have been forwarded by the 10 o'clock train to Sheffield and have been delivered before 7.30. It was in fact sent down in the ordinary course by a train at or about 12 o'clock, and was delivered in due course at 7.30.

This evidence raises a strong presumption in favor of the applicant. The company seeks to rebut this presumption, and the result of the evidence on its behalf is as follows: Mr. Claxton, who was employed by the promoters with a staff of about ten clerks, was engaged from shortly after the end of the board meeting on the afternoon of the 26th throughout the whole night in preparing from the allotment sheets the letters of allotment. Their task ended at about 7 in the morning, when Mr. Claxton and one of his clerks took the letters, which were fastened in bundles of fifty, in a cab to St. Martin's-le-Grand. They got out of the cab, and, seeing a porter in livery outside the building, had some conversation with him, in the course of which a postman came by and offered to take the letters. They gave him sixpence or a shilling for his trouble. He went into St. Martin's-le-Grand, came back, and said it was "all right." Mr. Claxton was not, in some respects, a satisfactory witness, but for the purposes of my judgment I assume that the letter of allotment to Dr. Jones was among those taken to St. Martin's-le-Grand and thus dealt with.

It was contended that this was a posting of the letter at St. Martin's-le-Grand. It seems to me, however, that the postman was not an agent of the post-office to receive the letters. The *Postal Guide,* at p. 47, expressly states that town postmen are not allowed to take charge of letters for the post. Mr. Anderson, the witness from the post-office, stated that any man would be reported if discovered to have done any such thing. I cannot, therefore, regard the postman as anything better than a boy messenger employed by Claxton to post the letters, and the mere fact of handing the letter to the postman outside St. Martin's-le-Grand was not a posting of the letter.

It is further urged that directly the postman entered St. Martin's-le-Grand the letter thereupon came into the lawful custody of the post-office, and was posted, without reference to what the postman did with it. I am, however, unable to follow this view. It is not possible for me to ascertain precisely what was done with the letters by the unknown postman. He may have left them at a table or in a bag until some later hour. He may have taken them to a branch office. All I know is that it was not until a much later hour that they were found on the table appropriated to branch office letters.

However that may be, I think that the company has failed to prove that the letter, which did not leave the post-office until about 11 o'clock, was posted before 8.30, or before 9.30, at which hour the secretary arrived and opened the letter of withdrawal.

As to the point that the notice of withdrawal did not reach the company when it was opened by the secretary, I think there is no foundation for the suggestion. The secretary is the man whose duty it was to receive and open letters of that nature. The result is that I think the withdrawal was in time, and I must therefore make an order removing the name of Dr. Jones from the register in respect of the 1000 shares; and I must order the return of the deposit, with interest at 4 per cent. The company must pay the costs of the motion.[1]

Here the Ct. concedes that if A makes an offer by mail to B, without specifying some other exclusive mode for transmitting the reply, B's mailing an acceptance makes a contract even tho B withdraws his letter from the mail and holds that B not having been herein authorized to accept by mail

SCOTTISH AMERICAN MORTGAGE COMPANY, LTD. *v.* W. S. DAVIS, ET AL.

TEXAS SUPREME COURT, May 11, 1903.

[*Reported in* 96 *Texas*, 504]

BROWN, ASSOCIATE JUSTICE. — W. S. Davis sued the Scottish-American Mortgage Company, Limited, and Brown Brothers to recover commissions alleged to be due to him from them for procuring a purchaser for certain lands. Brown Brothers were the agents of the mortgage company and represented it in the transaction. The mortgage company and Brown Brothers pleaded over against J. R. Couts, the alleged purchaser, but he was dismissed from the case on a plea of his privilege to be sued in Parker County. The following are the findings of fact by the Court of Civil Appeals:

"The evidence discloses that Brown Bros. resided in Austin, Texas. Davis resided in Fort Worth, Texas, and the communication between them was through the mails. Couts resided in Weatherford and Davis first got in communication with him through Hon. I. W. Stephens, who stated to Davis that Couts would like to purchase the land. After various communications between the parties, Brown Bros. submitted, through Davis, to Couts a proposition to sell. This Couts declined: Davis then went to Weatherford, saw Couts, and secured from him a written proposition to purchase. This was sent by Davis to Brown Bros., and on January 23, 1900, Brown Bros. re-

[1] "It is clear that when the plaintiff in pursuance of defendant's request, deposited the duplicate of the contract signed by her, with her address, in the United States street mailing-box, the agreement by that act became complete." Watson *v.* Russell, 149 N. Y. 388, 391. See also Wood *v.* Calnan, 61 Mich. 402, 411; Greenwich Bank *v.* De Groot, 7 Hun, 210, *acc.* In Pearce *v.* Langfit, 101 Pa. 507, 511, the Court said: "It certainly can make no difference whether the letter is handed directly to the carrier, or is first deposited in a receiving box and taken from thence by the same carrier. . . . The postal regulations of the United States require that carriers while on their rounds shall receive all letters prepaid that may be handed them for mailing."

turned the same to Davis with this interlineation: 'Subject to letter from Brown Bros. to W. S. Davis & Co., dated 20th of January, 1900.' The letter of January 20, 1900, mentioned, related to a tax title on twelve sections of said land and stated, 'You will recollect that there is an old absolutely invalid tax title on twelve sections. We could clear off this title by suit easily, but prefer that the purchaser do it and would pay half of the costs of the suit.' The proposition so interlined by Brown Bros. was sent to Couts by Davis. After receiving same Couts, on the morning of January 26, 1900, met Judge Stephens in Weatherford on his way to take the train for Fort Worth, and told him (Stephens) that he could tell Davis that he (Couts) had decided to take the land. Stephens said for him to confer direct with Brown Bros., which he assented to. When Judge Stephens reached Fort Worth he told Davis of the conversation he had with Couts. Davis on the same day wired Brown Bros., that Couts had accepted and followed same with a letter. On that same day Couts mailed to Brown Bros. the following letter, to wit:

"'January 26, 1900.

"'Messrs. Brown Bros., Austin, Texas:

"'Gentlemen. — You are hereby notified that I accept the interlineation above the last line of first page of preliminary contract and will take the land as indicated by said agreement.

"'I think, however, that you people ought to pay the whole cost of clearing title, but will not let that prevent the trade. You will please advise me what you think is best plan of procedure in clearing title. Shall we sue for same or act on the defense and wait for adverse claimant to institute proceedings?

"'The abstract received, which is too large for immediate examination. I accept relying on your statement and that it will show up as represented. Yours truly,

"'J. R. Couts.'

"This letter never reached Brown Bros., it being intercepted the next day by a telegram sent by one Holland at the instance of Couts to the postmaster at Austin, who returned it to Couts, and on that day 27th, Couts telegraphed Brown Bros, that he objected to the land on account of its shape and declared the trade off. In the letter from Brown Bros. to Davis of January 22d, in which Couts' proposal was returned interlined by Brown Bros., they said: 'Your commission, of course, will be payable only in the event of the sale going through according to the contract.' This is the first time Brown Bros. said anything to Davis as to when the commissions were payable."

A judgment was entered in favor of Davis against the mortgage company and Brown Bros. for $3382, which was affirmed against the mortgage company and reversed and rendered in favor of Brown Bros. by the Court of Civil Appeals.

The controlling question in this case is, was there at any time a contract between the mortgage company and Couts which could have been enforced by either party? The first proposition in writing that passed between the parties was sent by Brown Bros., as agents of the mortgage company, to Davis to be submitted to Couts, who rejected it and returned the proposition in a modified form to Brown Bros. for

their acceptance. Brown Bros. did not accept the proposition as modified by Couts, but in turn added other terms, and returned it to Davis to be again submitted to Couts, who took the matter under advisement, which left the proposition open for rejection by either party. Up to this time their minds had not met in agreement. Couts, after consideration of the proposed contract, told his friend, Judge Stephens, that he would accept it, and authorized Stephens to state that fact to Davis in Fort Worth, but upon the suggestion of Stephens, Couts concluded to communicate through the mail with Brown Bros. and to close the trade with them. Judge Stephens stated the conversation between himself and Couts to Davis at Fort Worth, telling him that Couts would communicate directly with Brown Bros. and "close the contract with them." These facts did not constitute a binding obligation on Couts; he might withhold his intended acceptance. When Couts put his acceptance of the proposition in the postoffice to be delivered to Brown Bros. at Austin it was still subject to his control, and might be recalled at any time before actual delivery, unless the facts bring it within the rule of law hereafter stated.

The authorities are well-nigh unanimous in asserting that, when a party submits to another through the mail a proposition of purchase or sale, the receiver of the proposition has the right within a reasonable time and before it is withdrawn to accept by a writing deposited in the postoffice duly stamped, ready for carriage and delivery, and such an aceptance binds the proposer of the contract from the time the deposit is made in the postoffice, whether it be delivered or not. Blake *v.* Insurance Co., 67 Texas, 163; Bryant *v.* Booze, 55 Ga., 445; Levy *v.* Cohen, 4 Ga., 13; Moore *v.* Pierson, 6 Iowa, 292; Vassar *v.* Camp, 11 N. Y., 441; Hunt *v.* Higman, 30 N. W. Rep., 769; Hallock *v.* Insurance Co., 2 Dutch., 280; Dunlop *v.* Higgins, 1 H. L. C., 397. Any number of authorities to the same effect might be added.

The facts of this case do not bring it within the rule above laid down, because there had been no proposition submitted by Brown Bros. on behalf of the mortgage company to Couts *through the mail*, hence there was no implied authority for Couts to accept by mail except by actual delivery of his acceptance. When Couts deposited his letter in the postoffice it was subject to his control until delivered to the party addressed, and he had a perfect right to withdraw his acceptance and abandon the contract, because it did not bind the mortgage company until delivered and could not bind Couts alone, — it must be mutual. There never was a time when Couts was legally bound to take the land. Davis never did present Couts "able, ready and willing" to accept a deed for the land from the mortgage company, nor did the mortgage company ever decline to carry out the proposed contract; on the contrary, after Brown Bros. received the telegram withdrawing the proposition they made an earnest and persistent effort to induce Couts to carry out the trade but he refused.

Neither Brown Bros., Davis, nor the mortgage company ever knew that Couts had mailed a written acceptance until after he had repeatedly rejected all propositions from Brown Bros. to carry it out and suit had been commenced by Davis to recover his commissions.

There is no evidence to support the judgment in favor of Davis against the mortgage company, and, from the undisputed facts, it is evident that no right of action can be established upon another trial in favor of Davis. It is therefore ordered that the judgment of the Court of Civil Appeals as between Davis and the mortgage company be reversed, and that judgment be here entered in favor of the mortgage company that Davis take nothing by his suit and for all costs. The judgment of the Court of Civil Appeals as to all the other parties is affirmed. *Reversed and rendered.*

S. R. LUCAS, Appellant, *v.* WESTERN UNION TELEGRAPH COMPANY

Iowa Supreme Court, October 19, 1906

[*Reported in* 131 *Iowa,* 669]

Ladd, J.[1] Plaintiff sought to recover profits he would have made in an exchange of real estate but for the negligence of defendant in failing to promptly transmit a telegram. Verdict was directed for defendant on two grounds: (1) There was no proof of damages; and (2) the delay in transmitting the message did not occasion the loss. Plaintiff resided at Anthon, Iowa, and was engaged in the business of "buying and selling lands and exchanging real property." He had been negotiating for some time to exchange property at Shelby, this state, with William Sas of Dexter, Iowa, and, in the evening of November 11, 1904, received a letter, written and mailed by Sas two days previous, making the following proposition: "I will put in my store property here with the extra piece of ground back of it just as I showed you last spring and $6500 in cash, any encumbrance now on property to be deducted from above amt. and assumed by me. If above is satisfactory please make out your contract and send down. I will make a $1500 deposit until the papers can be made out and abstract brought down, if I get the building I expect I can make a better deal with Jacobs. My man here takes my stock between 5th and 10th of January. I will have to know at once as I have another deal pending." At 9.10 o'clock the next morning plaintiff handed defendant's agent at Anthon this telegram: "November 12, Anthon, Iowa, 1904. To William Sas, Dexter, Iowa. Just received letter. Offer accepted. Send contract today. S. R. Lucas." It was not sent until 4.41 o'clock, P.M. and was delivered to Sas the

[1] A portion of the opinion is omitted.

same evening at three minutes after 6 o'clock. The latter immediately wrote plaintiff that he had put another party off until 3.30 o'clock P.M. of that day, and, not hearing from him, had negotiated an exchange with another. Evidence was offered tending to support the statement.

The proposition of an exchange was made to plaintiff by letter. In committing it, properly addressed to the mails for transmission, the post-office became the agent of Sas to carry the offer, he taking the chances of delays in the transmission. Mactier's Adm'rs. *v.* Frith, 6 Wend. (N. Y.) 103 (21 Am. Dec. 262); Adams *v.* Lindsell, 1 B. & Ald. 681; Averill *v.* Hedge, 12 Conn. 424, 9 Cyc. 294. Having sent the proposition by mail he impliedly authorized its acceptance through the same agency. Such implication arises (1) when the post is used to make the offer and no other mode is suggested, and (2) when the circumstances are such that it must have been within the contemplation of the parties that the post would be used in making the answer. Tuttle *v.* Iowa State Traveling Men's Association, 132 Iowa, 652. The contract is complete in such a case when the letter containing the acceptance is properly addressed and deposited in the United States mails. Trevor *v.* Wood, 36 N. Y. 307 (93 Am. Dec. 511) and note; Brewer *v.* Horst-Lachmund Co., 127 Cal. 643 (50 L. R. A. 240) and extended note; Dunlop *v.* Higgins, 1 H. L. C. 381; Household Ins. Co. *v.* Grant, 41 L. T. N. S. 298, 9 Cyc. 295. This is on the ground that the offerer by depositing this letter in the post-office, selects a common agency through which to conduct the negotiations, and the delivery of the letter to it is in effect a delivery to the offerer. Thereafter the acceptor has no right to the letter and cannot withdraw it from the mails. Even if he should succeed in doing so the withdrawal will not invalidate the contract previously entered into.

But plaintiff did not adopt this course. On the contrary he chose to indicate his acceptance by transmitting a telegram to Sas by the defendant company. Sas had done nothing to indicate his willingness to adopt such agency and the defendant in undertaking to transmit the message was acting solely as the agent of the plaintiff. The latter might have withdrawn the message or stopped its delivery at any time before it actually reached Sas. It is maifest that handing the message to his own agent was not notice to the sendee of the telegram. The most formal declaration of an intention of acceptance of an offer to a third person will not constitute a contract. A written letter or telegram, like an oral acceptance, must be communicated to the party who has made the offer or to some one expressly or impliedly authorized to receive it, and this rule is not complied with by delivering it to the writer's own agent or messenger even with direction to deliver to the offerer. Hebbs' Case, L. R. 4 Eq. 9. In that case Hebbs wrote asking that certain shares in a newly formed company might be allotted to him. The

directors instructed their agent through the mail that such an allotment should be made and the shares were registered as Hebbs'. It was held that this did not complete the contract or render it obligatory on him to take and pay for the shares. Lord Romilly, in the course of the opinion said: "If A writes to B a letter offering to buy land of B for a certain sum of money, and B accepts the offer and sends his servant with a letter containing his acceptance, I apprehend that, until A receives the letter, A may withdraw his offer, and B may stop his servant on the road and alter the terms of his acceptance or withdraw it altogether; he is not bound by communicating the acceptance to his own agent." Dunlop v. Higgins, *supra,* decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason for that is that the post-office is the common agent of both parties.

The party making the offer may be entirely satisfied to trust the mails, and not be willing to chance the use of the telegraph. The principle is lucidly stated so as to make the company his agent in the somewhat recent work of Hare on Contracts, 363.

It is very evident on authority and principle that, in the absence of any suggestion, one transmitting an offer by mail cannot be bound by an acceptance returned in some other way until it is received or he has notice thereof.

The plaintiff, then, did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 o'clock P.M. of the day after the letter had been received and the question arises whether this was "at once" within the meaning of the offer which stated that another deal was pending. Like "forthwith" and "immediately," "at once" does not mean instantaneously but requires action to be taken within a reasonable time, or, as said in Warder, Bushnell & Glessner Co. *v.* Horne, 110 Iowa, 283, it is synonymous with the words mentioned and "as soon as possible," and is "usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing." It is doubtful whether the same vigilance should be extracted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. See Kempner *v.* Cohn, 47 Ark. 519 (1 S. W. 869, 58 Am. Rep. 775). The circumstances of each case necessarily have an important bearing. There was no evidence of the time a letter, if promptly mailed, might have reached Sas. He had indicated in his letter that he was contemplating another deal, and we think ordinary minds fairly differ as to whether, in these circumstances, an acceptance twenty-three or twenty-four hours after the letter had been received was in time to bind the party making the offer, and the issue was for the jury to determine. There are numerous decisions determining that the time within which an acceptance has been made is reasonable or unreasonable, but few passing upon the question as to whether

the circumstances were such as to carry that issue to the jury. Each case necessarily depends upon its particular facts, and for this reason authorities are of slight aid in determining the question.

If, because of unreasonable delay in the acceptance, the contract was not completed, then it was also for the jury to say whether the defendant was negligent in transmitting the message, and, owing to this, plaintiff lost the benefit of entering into the contract. It follows that the court erred in directing a verdict for the defendant.

Reversed.

POSTAL TELEGRAPH-CABLE COMPANY *v.* FLOYD WILLIS

MISSISSIPPI SUPREME COURT, October 1908

[*Reported in* 93 *Mississippi* 540]

MAYES, J., delivered the opinion of the court.

Floyd Willis was engaged in buying and selling cotton in the city of Jackson, Miss. On the 5th day of December, 1906, he sent a telegram to Knight, Yancey & Co., of Mobile, Ala., submitting to them an offer to sell certain cotton which he then owned. The message was duly transmitted by the telegraph company to Mobile and duly delivered. On receipt of the telegram Knight, Yancey & Co. wired Willis, accepting the offer. This message of acceptance by them was duly delivered to the telegraph company at Mobile, and by it sent to Willis, at Jackson, and received at the Jackson office at 1.05 P.M. At 2 o'clock of the same day this message of acceptance had not been delivered to Willis although his office was within a short distance of the telegraph office. About 2 o'clock, and while this message lay undelivered in the Jackson office, Morrow, agent and manager of the firm of Knight, Yancey & Co., of Mobile, called Willis over the phone, and according to Mr. Willis's own statement asked him (Willis) if he had received the acceptance of his offer; that is, the acceptance he sent by telegraph. Willis replied to him over the phone that he had not. Whereupon Morrow said he was very glad of it, and would then withdraw his acceptance, to which Willis assented. Willis, up to this time, had not received the telegram of acceptance from the telegraph office, and went immediately to the telegraph office, called for the telegram, and the same was delivered to him. The same cotton was subsequently sold about 10 o'clock at night to the same parties, at a loss of some $218 to Willis, and the object of this suit is to hold the telegraph company liable for the loss thus sustained by Willis. There was a verdict in the court below in favor of the plaintiff, from a judgment on which the telegraph company appeals.

It is settled law and seems to be conceded on both sides, that under ordinary circumstances the acceptance of Willis' offer was complete

when the telegram of acceptance of the proposition made was delivered by Knight, Yancey & Co. to the telegraph company in Mobile, and that the agreement then and there became a binding contract according to the express terms contained in the telegram from Willis. The main contention of appellees is that, while this is ordinarily true, yet in this particular instance the contract was not a binding contract, for the reason that, according to the custom prevailing among men engaged in the cotton business, the acceptance of the offer did not become binding until the actual delivery of the telegram by the telegraph company into the hands of Willis. It is claimed on the part of appellee that this is a general custom or usage prevailing among those engaged in the cotton trade, recognized and acted under by them, and for this reason there was no contract until actual delivery to Willis, and, because there was no contract, the loss to the plaintiff was occasioned directly by the negligence of the telegraph company in failing to properly deliver the message. On the other hand, it is claimed by the telegraph company that there was a binding contract at the time when this telegram was delivered in Mobile, and that any action taken by Mr. Willis occasioning loss to him was caused by his own act in releasing Knight, Yancey & Co. from a valid contract; that they cannot be held responsible for it, because no loss occurred by reason of their negligence. According to Willis' own testimony, he was advised of the fact that there had been a telegram of acceptance before the order was cancelled over the telephone.

The contract made by the parties by virtue of these telegrams is clear, unambiguous, and valid, unless the so-called usage or custom can be invoked to relieve the parties from the legal effect of their acts. There is no such uncertainty about this contract as makes it necessary, because of indeterminate terms, to resort to custom or usage in order to understand exactly what was meant; but the contract is express in its terms, unambiguous, and became binding on the parties when the telegram of acceptance was delivered to the telegraph company in Mobile. It would be in the highest degree impolitic, and be the cause of introducing interminable confusion into contracts, if, when the terms of a contract are express, clear, and valid under the law, its legal effect could be controlled by some local or trade custom. Our court has long since been committed to this wise doctrine. Shackleford *v.* N. O., J. & Great Northern Ry., 37 Miss. 202. In the case of Hopper *v.* Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. Lt. Rep. 771, citing many authorities, the court says: "Usage and custom cannot be proved to contravene a rule of law, or to alter or contradict the express or implied terms of a contract free from ambiguity, or to make the legal rights or liabilities of the parties to a contract other than they are by the terms thereof. When the terms of a contract are clear, unambiguous, and valid, they must prevail, and no evidence of custom can be permitted to change them."

In the case of Shackleford *v.* New Orleans, Jackson & Great Northern Railroad Company, 37 Miss. 202, the court has said: "These usages, many judges are of the opinion, should be sparingly adopted by the courts as rules of law, as they are often founded on mere mistake, or on the want of enlarged and comprehensive views of the full bearings of principles. Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of the contracts, arising, not from express stipulations, but from mere implications and presumptions and acts of a doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful or various senses. On this principle the usage or habit of trade, or conduct of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them." 2 Greenleaf's Ev. § 251 and note 5. And the court further says that, where a custom or usage is resorted to, such customs must be certain, uniform, reasonable, and not contrary to law. To the same effect is 2 Page on Contracts, p. 928: "The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intention of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications, assumptions, and acts of a doubtful or equivocal character."

Where the contract is definite and certain, the obligations of a party, by reason of the contract, become fixed by law by the terms of the contract which they have entered into, and, where there is nothing uncertain left in the contract, usage or custom has no place. There are many instances in which a contract may be explained and controlled by a custom prevailing among men engaged in a certain line of business, but this is not one of them. We think the court below erred in refusing to exclude all evidence in reference to the damages arising out of the failure of appellant to deliver the telegram.

For this reason the case is reversed and remanded.

Reversed.

HELEN C. LEWIS *v.* MATTHEW P. BROWNING

SUPREME JUDICIAL COURT OF MASSACHUSETTS, November 11, 1880–January 6, 1881

[*Reported in* 130 *Massachusetts,* 173]

CONTRACT for breach of the covenants of a written lease of a tenement in Boston. Trial in the Superior Court, without a jury, before Rockwell, J., who allowed a bill of exceptions in substance as follows:

The defendant admitted that there had been a breach of the conditions of the lease, and agreed that judgment might be entered for the plaintiff in the sum $2,168.22, unless the facts herein stated constituted a defence to this action.

The judge found that the defendant, who was a resident of New York in the year 1868, was, during the summer of that year, temporarily residing and practising his profession as a physician at Cape May, in the State of New Jersey, and that the plaintiff and her husband, Dr. Dio Lewis, residents of Boston at that time, were temporarily residing at Oakland, in the state of California; that, on June 10, 1878, Lewis, who was and still is the authorized agent of his wife, the plaintiff, wrote the defendant a letter, which was received by him, in which he requested the defendant to make him an offer for a new lease of said premises. The defendant replied, making such offer, by letter dated June 22, 1878. In this letter the defendant gave, as a reason for desiring to make the new contract, his anxiety to be released from all claim by the plaintiff.

On July 8, 1878, Lewis wrote the defendant a letter, which he received on July 17, 1878, at Cape May, in which Lewis accepted the defendant's offer with slight modifications, and which contained the following: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware. Telegraph me 'yes,' or 'no.' If 'no,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.' "

The defendant, on said July 17, went to the telegraph office of the Western Union Telegraph Company in Cape May, wrote a telegraphic despatch directed to Dio Lewis, Oakland, Cal., delivered it to the telegraphic agent and operator of said company, and paid the full price for its transmission to Oakland, and gave directions to have it forwarded at once. The defendant did not keep a copy of the telegram. He gave notice to the plaintiff to produce the telegram, and testified that he had exhausted all the means in his power in Boston, New York, and New Jersey in his endeavors to produce the telegram; that he had been to the Cape May office of the company, and had learned that the operator to whom he gave his dispatch was not in charge of that office; that he had made diligent search for him without being able to learn his whereabouts; and that in this search he had had the aid of the superintendent and other officers of the company in Boston. He also offered to prove, by an officer of the company in Boston, that both by rule and custom of the company, so far as he knew the custom, the despatches received and sent from all the offices of the company were destroyed after they had been in the possession of the company six months. If, under these circumstances, it was competent to prove the contents of said despatch by oral testimony, the judge found that the word telegraphed was "yes."

The judge also found that Lewis never received said telegram; that the new lease to be made, as stipulated in the letters of Lewis and the defendant, was to be like the former lease in form, with the various modifications and changes contained in said letters, and was to be delivered in Boston, and the consideration then paid; and that the Mr. Ware mentioned in Lewis's letter was the plaintiff's attorney, residing in Boston.

The defendant contended that a contract was completed by said letters and telegram on July 17, under the law of the State of New Jersey; and that this case was controlled by the law of New Jersey. The judge found that the law of New Jersey is as stated in Hallock *v.* Commercial Ins. Co., 2 Dutcher, 268; ruled, as matter of law, that the facts as above set forth did not show a new contract, and constituted no defence to this action; and found for the plaintiff in the sum agreed upon. The defendant alleged exceptions.

O. T. Gray, for the defendant.

D. E. Ware, for the plaintiff, was not called upon.

Gray, C. J. In M'Culloch *v.* Eagle Ins Co., 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langdell on Contracts (2d ed.), 989–996. In England, New York, and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post-office duly addressed. Adams *v.* Lindsell, 1 B. & Ald. 681; Dunlop *v.* Higgins, 1 H. L. Cas. 381, 398–400; Newcomb *v.* De Roos, 2 E. & E. 271; Harris's case, L. R. 7 Ch. 587; Lord Blackburn in Brogden *v.* Metropolitan Railway, 2 App. Cas. 666, 691, 692; Household Ins. Co. *v.* Grant, 4 Ex. D. 216; Lindley, J., in Byrne *v.* Van Tienhoven, 5 C. P. D. 344, 348; 2 Kent Com. 477, note *c.;* Mactier *v.* Frith, 6 Wend. 103; Vassar *v.* Camp, 1 Kernan, 441; Trevor *v.* Wood, 36 N. Y. 307; Hallock *v.* Commercial Ins. Co., 2 Dutcher, 268, and 3 Dutcher, 645; Tayloe *v.* Merchants' Ins. Co., 9 How. 390.

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. Thesiger, L. J., in Household Ins. Co. *v.* Grant, 4 Ex. D. 223; Pollock on Cont. (2d ed.) 17; Leake on Cont. 39, note. And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: "If you agree to this plan, and will telegraph

me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'yes' or 'no.' If 'no,' I will go at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'" Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a despatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception.

Exceptions overruled.[1]

TINN *v.* HOFFMAN AND COMPANY

In the Exchequer Chamber, May 14, 15, 1873

[*Reported in* 29 *Law Times* (*New Series*), 271]

This was an action brought by the plaintiff against the defendants to recover damages in respect of a breach of contract to deliver 800 tons of iron; and by the consent of the parties, and by order of Martin, B., dated 30th May, 1872, the facts were stated for the opinion of the Court of Exchequer in the following

Special Case

1. The plaintiff, Mr. Joseph Tinn, is an iron manufacturer, carrying on business at the Ashton Row Rolling Mills, near Bristol; and the defendant, who trades under the name and style of Hoffman and Co., is an iron merchant, carrying on business at Middlesbro'-on-Tees.

2. In the months of November and December, 1871, the following correspondence passed between the plaintiff and the defendant relating to the proposed purchase and sale of certain iron, the particulars of which fully appear in the letters hereinafter set forth.

The plaintiff to the defendant: —

Nov. 22, 1871.

Messrs. Hoffman and Co.:

Dear Sirs, — Please quote *your lowest price for* 800 *tons* No. 4 Cleveland, or other equally good brand, delivered at Portishead at the rate of 200 tons per month, March, April, May, and June, 1872. Payment by four months' acceptance.

Yours truly, J. Tinn.

[1] Household Ins. Co. *v.* Grant, 4 Ex. D. 216, 223, 238; Pennsylvania &c. Ins. Co. *v.* Meyer, 126 Fed. 352, 354; Haas *v.* Myers, 111 Ill. 421, 423; McCone *v.* Eccles, 42 Nev. 451; Vassar *v.* Camp, 11 N. Y. 441, *acc.*

3. The defendant's reply: —

Royal Exchange Buildings, Middlesbro'-on-Tees,
24th Nov. 1871.

Joseph Tinn, Esq., Bristol:

Dear Sir, — We are obliged by your inquiry of the 22d inst., and by the present beg to offer you 800 tons No. 4 forge Middlesbro' pig iron (brand at our option, Cleveland if possible) at 69*s.* per ton delivered at Portishead, delivery 200 tons per month, March, April, May, and June, 1872, payment by your four months' acceptance from date of arrival.

We shall be very glad if this low offer would induce you to favor us with your order, and waiting your reply by return, we remain, dear Sir,

Yours truly, A. Hoffman and Co.

4. The plaintiff to the defendant: —

Bristol, 27th Nov., 1871.

Messrs. Hoffman and Co.:

Dear Sirs, — The price you ask is high. If I made the quantity 1,200 tons, delivery 200 tons per month for the first six months of next year I suppose you would make the price lower? Your reply per return will oblige, J. Tinn.

5. The defendant to the plaintiff, in reply: —

Royal Exchange Buildings, Middlesbro'-on-Tees,
28th Nov., 1871.

Joseph Tinn, Esq., Bristol:

Dear Sir, — In reply to your favor of yesterday, we beg to state that we are willing to make you an offer of further 400 tons No. 4 forge Middlesbro' pig iron, 200 tons in Jan., 200 tons in Feb., at the same price we quoted you by ours of the 24th inst., though the rate of freight at the above-named time will doubtless be considerably higher than that of the following months.

Our to-day's market was very firm again, and we feel assured we shall see a further rise ere long.

Kindly let us have your reply of post as to whether you accept our offers of together 1,200 tons and oblige yours truly,

A. Hoffman and Co.

6. The plaintiff to the defendants: —

Bristol, 28th Nov., 1871.

Messrs. Hoffman and Co.:

No. 4 Pig iron.

Dear Sirs, — You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1,200 tons, referred to in my last, at 68*s.* per ton.

Yours faithfully, Joseph Tinn.

7. The defendant's reply: —

Royal Exchange Buildings, Middlesbro'-on-Tees,
29th Nov., 1871.

Joseph Tinn, Esq.:

Dear Sir, — We are obliged by your favor of yesterday, in reply to which we are sorry to state that we are not able to book your esteemed order for 1,200 tons No. 4 forge at a lower price than that offered to you by us of yesterday, viz., 69*s.*, and even that offer we can only leave you on hand for reply by to-morrow before twelve o'clock. Waiting your reply, we remain, dear sir, yours truly,

A. Hoffman and Co.

8. On the 1st Dec., 1871, the plaintiff sent a telegram to the defendants, of which the following is a copy —

From Tinn, Ashton.

To Hoffman and Co., Middlesbro'-on-Tees.

Book other 400 tons pig iron for me, same terms and conditions as before.

[Other immaterial correspondence followed.]

14. It is agreed that all the facts and circumstances mentioned in the above correspondence are true, and that the court are to have power to draw all inferences of facts in the same way as a jury might do.

15. The course of post between Bristol and Middlesbrough is one day.

The questions for the opinion of the court are, first, whether, upon the facts stated and documents set out in the case, there is any binding contract on the part of the defendants to deliver 800 tons of iron to the plaintiff; secondly, whether, upon the facts and documents set out in the case, there is any binding contract on the part of the defendants to deliver any quantity of iron to the plaintiff, and if yea, what quantity, and on what terms and conditions.

In the Court of Exchequer, Bramwell, Channell, and Pigott, BB., held the defendant entitled to judgment; Kelly, C. B., dissented.

Kingdom, Q. C., and *Arthur Charles*, for the plaintiff.

A. L. Smith and *H. Lloyd*, A. C., for the defendants.

Brett, J. The question is, whether upon a true construction of this correspondence there is a binding contract between the plaintiff and the defendants for the 800 tons of iron at 69*s.* It is argued on the one side that such a contract is disclosed because, it is said, that the defendants' letter of the 24th November is an offer for the sale of 800 tons of iron, and this letter of the 28th November leaves open the time for accepting that offer of the 24th November, and makes a new offer with regard to another 400 tons; and that the defendants' offer of the 24th November being thus opened by their letter of the 28th, the plaintiffs' letter of the 28th is an acceptance

of the defendants' offer of the 24th. On the other side it is argued that the defendants' letter of the 28th November is not an opening of their offer of the 24th, but that it is an offer with regard to 1,200 tons; and that even if it were a separate offer with regard to 800 tons and 400 tons, still that the true view of the matter is not that it reopens the letter of the 24th, but that it makes a new offer with regard to the 800 tons, and another separate offer with regard to 400 tons; and that, upon such a view, the renewed offer with regard to 800 tons is not accepted, because the letter of the plaintiff of the 28th November was not in answer to that offer, but was a letter crossing it. Now, with regard to the construction of the defendants' letter of the 28th November, it seems to me that we must consider that the defendant's letter of the 24th November is in answer to a request of the plaintiff's of the 22d November for an offer with regard to 800 tons, and is therefore an offer by them with regard to 800 tons. That offer left open to the plaintiff to accept it within a period which is to be computed by the return of post. I agree that the words "Your reply by return of post" fixes the time for acceptance, and not the manner of accepting.[1] But that time elapsed; there was no acceptance within the limited time. So far from there being an aceptance, it seems to me that the plaintiff's letter of the 27th November rejects that offer; it rejects it on the ground that the price is higher than the plaintiff is willing to give. The offer is, therefore, not accepted within the limited time, but is rejected, and it seems to me is at once dead. The letter of the 27th then asks for an offer with respect to 1,200 tons, and the letter of the 28th November is a letter written "In reply to your favor of yesterday," — that is, In reply to your request for an offer with regard to 1,200 tons, — "I now make you this offer." That seems to show that the letter of the 28th November of the defendants is an offer with regard to 1,200 tons, and not with regard to 800 tons and 400 tons separately. The way in which the offer with regard to the 1,200 tons is made is this: "With regard to the first 800 of them, I make you a new offer upon the same terms as I made in the former offer on the 24th. With regard to the remaining 400 tons, I offer you to deliver them at the same price, but at different periods of delivery." I think that the defendants' letter of the 28th November, being a letter in answer to a request with regard to 1,200 tons, is an offer with regard to 1,200 tons, and that no such offer was ever accepted; but even if it could be taken that it was a separate offer with regard to 800 tons and 400 tons, I cannot accede to the view that it *reopened* the offer of the 24th November. That offer was dead, and was no longer binding upon the defendants at all; and therefore it seems to me to be a wrong phrase to say that it *reopened* the offer of the 24th November. The only legal way of construing

[1] As to the effect of these words, see Ortman *v.* Weaver, 11 Fed. Rep. 358, 362; Maclay *v.* Harvey, 90 Ill. 525; Bernard *v.* Torrance, 5 G. & J. 383; Taylor *v.* Rennie, 35 Barb. 272; Howells *v.* Stroock, 50 N. Y. App. Div. 344.

it is to say that it is a new offer with regard to 800 tons. If it were a separate offer, which I should think it was not, it then would be a new offer with regard to 800 tons, and a separate offer with regard to 400 tons; but, even if it were so, I should think that the new offer with regard to the 800 tons had never been accepted, so as to make a binding contract. The new offer would not, in my opinion, be accepted by the fact of the plaintiff's letter of the 28th November crossing it. If the defendants' letter of the 28th November is a new offer of the 800 tons, that could not be accepted by the plaintiff until it came to his knowledge, and his letter of the 28th November could only be considered as a cross offer. Put it thus: If I write to a person and say, "If you can give me £6,000 for my house, I will sell it you," and on the same day, and before that letter reaches him, he writes to me, saying, "If you will sell me your house for £6,000 I will buy it," that would be two offers crossing each other, and cross offers are not an acceptance of each other; therefore there will be no offer of either party accepted by the other. That is the case where the contract is to be made by the letters, and by the letters only. I think it would be different if there were already a contract in fact made in words, and then the parties were to write letters to each other, which crossed in the post; those might make a very good memorandum of the contract already made, unless the Statute of Frauds intervened. But where the contract is to be made by the letters themselves, you cannot make it by cross offers, and say that the contract was made by one party accepting the offer which was made to him. It seems to me, therefore, in both views, that the judgment of the court below was right.

Judgment of the majority of the court below affirmed.[1]

MACTIER'S ADMINISTRATORS, Appellants, AND FRITH, Respondent

New York Court of Errors, December, 1830

[*Reported in* 6 *Wendell,* 103]

Appeal from Chancery. At New York, in the autumn of 1822, the respondent and Henry Mactier, the intestate, agreed to embark in a commercial adventure, in which they were to be jointly and equally interested. Frith was to direct a shipment of 200 pipes of brandy from France to New York, to be consigned to Mactier, who was to ship to the respondent at Jacmel, in St. Domingo, provisions to the amount of the invoice cost of the brandy, and the respondent was to place the shippers of the brandy in funds by shipments of

[1] Blackburn, Archibald and Keating, JJ., delivered concurring, and Honyman and Quain, JJ., dissenting, opinions. The statement of facts and of the decision in the lower court has been abbreviated.

coffee to France, in French vessels, and the parties were to share equally in the result of the speculation all around.

In pursuance of this arrangement, Frith, on the 5th September, 1822, wrote Firebrace, Davidson, & Co., a mercantile house at Havre, to ship 200 pipes of brandy to New York to the consignment of Mactier. On the 24th of December, Frith, who had returned to Jacmel, where he did business as a merchant, wrote a letter to Mactier on a variety of subjects, in which was contained a paragraph in these words: "I also have the pleasure of handing you copies of Messrs. Firebrace, Davidson, & Co.'s letters regarding the brandy order. By-the-bye, as your brother, before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, *I would propose to you to take the adventure solely to your own account,* holding the value to cover the transaction to my account in New York." On the 17th January, 1823, Mactier wrote to Frith, acknowledging the receipt of his letter of the 24th ult.; thanks him for sending the copy of Firebrace, Davidson, & Co.'s letter on the subject of the brandy order; says that he has received a letter from them, informing that the brandy would be shipped and leave Bordeaux about the 1st of December then past; and adds, "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation. As you have, however, expressed a wish that I should take the adventure to my own account, *I shall delay coming to any determination till I again hear from you.* The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti, to be invested in coffee for France, *in which case I will at once decide to take the adventure to my own account.* Our London accounts, down to the 5th of December, speak confidently of a war between France and Spain, — a measure which, if carried into effect, would operate to *your disadvantage.*" Also, "The next arrival from Europe will probably decide the question of peace or war, and I will lose no time in communicating the same to you;" and also, "Let what will happen, I trust you will in no way be a sufferer." On the 7th March, 1823, Frith wrote Mactier,[1] making no other allusion to the last letter of Mactier than the following: "I have received your esteemed favors of the 17th and 31st January, *and note their respective contents.*" On the twelfth day of March, 1823, the ship La Claire arrived at New York, laden with the brandy in question, and was at the wharf on the morning of the 13th of March. A clerk of Mactier testified that he had a conversation with Mactier about the time the brandy arrived, perhaps the morning

[1] This letter was received on the 7th of April. 1 Paige, 434, 442.

after, and Mactier then said *he should take it to himself.* A merchant of New York also testified that Mactier consulted with him on the subject of some brandy which he expected to arrive; there was some offer for his taking it on his own account, and he appeared inclined to take it. From the state of things, he advised Mactier to take it, and there was a letter drafted by Mactier upon the subject, in which the merchant made some alterations. The letter stated that he, Mactier, should take the brandy to his own account. On the 17th of March, Mactier entered the brandy at the custom-house *as owner,* and not as consignee, took the usual oath, and gave a bond for the duties. On the twenty-second day of March, he sold 150 pipes of the brandy on the wharf to several commercial houses, and took their notes for the price of the same. The remaining 50 pipes were put in the public store, and remained there in bond, the liquidated duties not having been secured to be paid by Mactier. On the twenty-fifth day of March, Mactier wrote a letter directed to Frith at Jacmel, in which he said: "I have now to advise the arrival of French ship La Claire with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December, and my answer thereto of the 17th January last, *I have decided to take this adventure to my own account.* I therefore credit you with the amount of the invoice," amounting to $14,254.57. To this letter was attached a postscript, dated the 31st of March. On the twenty-eighth day of March, Frith wrote a letter to Mactier, dated at Jacmel, in which, speaking of the brandy in question, he says: "With regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat to you in my previous letter, in reply to yours of the 17th of January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." Previous to the arrival of these two last letters at their respective places of direction, Mactier was dead, he having departed this life on the 10th of April, 1823. On the 21st of April, Frith again wrote a letter addressed to Mactier, in which he acknowledges the receipt of his letter of the 25th of March, says he has noted its contents, and requests Mactier to charter on his account a stanch, first-class vessel, and send out to Jacmel by her 400 barrels of flour, 150 barrels of pork, 150 barrels of beef, 100 barrels of mackerel, &c., &c., In the mean time, however, Mactier having died, administration of his goods, &c., was granted to A. N. Lawrence and another, who, in May, 1823, gave the requisite bonds to secure the duties on the 50 pipes of brandy which had not been bonded for by Mactier in his life-time, except by the general bond on entering the goods at the custom-house, and took the 50 pipes from the public store and sold them at public auction.

The respondent, unwilling to come in as a general creditor of Mactier and receive a *pro rata* distribution, on the 1st of April, 1824, filed his bill in the Court of Chancery, alleging that the brandy was shipped from France on his sole account, and that Mactier was only the consignee thereof.

By the answer it was admitted that the defendants had found among the papers of Henry Mactier two invoices of the 200 pipes of brandy, similar in all respects, except that one states the shipment to have been made "to the address and for the account of Henry Mactier," and the other states it to have been made "for the account of the complainant to the address of Henry Mactier." The first of the invoices was used upon entering the brandy at the custom-house. It also appeared in evidence that on the first day of March, 1823, Mactier effected an insurance on *commissions* arising on a consignment from Bordeaux to New York, to the amount of $1500. In a petty cash-book of Mactier's there is the following entry: "1823, March 17, John A. Frith's sales of brandy, paid entry at custom-house, eighty cents." The clerk of Mactier, who made this entry, testified that the name of Frith, prefixed to the entry in the petty cash book, does not necessarily prove that the brandy was Frith's, but it shows that he at that time supposed the brandy to be Frith's; if it had then belonged to Mactier, or if Mactier had decided to take it, and any entry in the books had been made showing that fact, he would have entered it, "Sales of brandy Dr. for entering," &c. At the time of making the entry, he considered the fact of ownership contingent. Mactier afterwards directed the account to be opened in the books, charging the brandy to himself, the account to be "Sales of brandy." An entry was made in the daybook, of the twenty-eighth day of March, crediting Frith with the invoice amount of the brandy. Entries, he said, are sometimes made several days after the transaction; then the entry refers back to the true date of the transaction, mentioning the time. The entry was made by the thirty-first day of March. He also testified that the letter of the 13th of March, mentioned in the complainant's bill, was copied on the night of that day, but he had no recollection when it left the office; it possibly might not have gone until the La Claire arrived.

Chancellor Walworth on exceptions to a master's report decreed that the master should report the amount due the complainant, on the principle that he, as *survivor,* is entitled to the net proceeds of the adventure of brandy, so far as they can be traced and identified, and has a specific lien on the net proceeds of the 50 pipes of brandy sold by the administrators, and on the proceeds of the notes given for the 150 pipes which remained uncollected or not passed away at the time of Mactier's death, or on so much as is necessary to satisfy the balance due complainant for payment and disbursements on account of that adventure, after deducting from those proceeds the balance of the amount paid for duties and expenses, if any,

over and above the amount of proceeds of the shipment of brandy which were received by Mactier in his lifetime. From this decree the defendants appealed. For the reasons of the Chancellor for the decree pronounced by him, see 1 Paige, 434. The cause was argued here by

S. Boyd and *S. A. Talcott,* for the appellants.

S. Stevens and *G. Griffin,* for the respondent.

By Mr. Justice Marcy: What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties: keeping silence, under certain circumstances, is an assent to a proposition; any thing that shall amount ot a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other; the knowledge, by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other.

I will now apply this law to the facts of this case. Frith's offer to sell his interest in the brandy certainly continued till his letter of the 24th of December was received at New York, and Mactier had a fair opportunity to answer it. If the answer of the 17th of January had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted. There was a promise to accept upon a contingency; for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is, in case of such a war, "I will at once decide to take the adventure to my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was, that if an expected event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: *Verbum imperfecti temporis rem adhuc imperfectum significat.* There is a wide differ-

ence between a promise to give an assent to a proposition for a contract on the happening of a contingency, and the annunciation of a present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised acceptance, and not the happening of the event, that gives validity to the contract. If, in this case, the offer of Frith had been to Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor, after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain, without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do to effect an acceptance was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy before the seventeenth day of March. The insurance that he effected on his commissions on the 1st of March disproves the existence of such a determination on that day; but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place on the 17th of March. In answer to the offer, Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war; on the 17th of March, when that event was considered settled, he entered the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th, with a postscript of the 31st of March, he accepts the offer. This letter was immediately transmitted to Frith, and as soon as the 28th of March entries were made in his books, showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

An offer, when once made, continues, as I have heretofore shown, to the satisfaction of my own mind at least, until it is expressly re-

voked, or until circumstances authorize a presumption that it is revoked. The offer itself may show very clearly when the presumption of revocation attaches. Where it is made to be replied to by return mail, the party to whom it is addressed must at once perceive that it is not to stand for an acceptance to be transmitted after the mail. If an offer stands until it is expressly withdrawn, or is presumed to be withdrawn, whether it is held out to a party at a particular period or not, is a matter of fact. Then we are to determine, as a matter of fact, whether Frith's offer was held out for Mactier's acceptance until the 31st of March; if Frith intended it should stand so, and he viewed himself as tendering it to Mactier down to that time, we are bound to regard it as standing, unless his intention was the result of the fraudulent conduct of Mactier. The acts of Frith, after the death of Mactier, could do nothing towards completing an unfinished contract; but I think they may be fairly adverted to for the purpose of ascertaining his intentions in relation to the continuance of his offer. On the 7th of March he acknowledges Mactier's letter of the 17th of January, which did not decline, as it has been construed to do, the offer, but apprised him that it was kept under advisement; and by using the expression, "noting the contents," Frith is, I think, to be understood as yielding to the proposed delay. If a doubt as to this construction of that letter could spring up in the mind, it would be at once removed by the perusal of the letter of the 28th of the same month. In that he expresses a wish to confirm what he had said in the letter making the offer to sell, and declares that he had in a previous letter, which must mean that of the 7th, omitted to communicate the same thing. In answering Mactier's letter which contained the acceptance of his offer, he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesces in the sale. It appears to me to be impossible to say, after reading the letters of Frith written subsequent to his knowledge of Mactier's acceptance, that he did not consider the offer as held out to Mactier down to the time when it was accepted, and the bargain closed by that acceptance; and I think we must adjudge it to have been closed, unless the agreement was nugatory by reason that the thing to which it related had not an actual or potential existence when the contract was consummated.[1] . . .

Whereupon, on the question being put, Shall the decree of the Chancellor appealed from be reversed? Chief Justice SAVAGE and Justices SUTHERLAND and MARCY, and eighteen Senators, voted in the affirmative; and three Senators voted in the negative, — viz., Senators MCCARTY, TODD, and WHEELER.

The decree of the Chancellor was accordingly reversed with costs.

[1] Portions of the statement of facts and of the opinion are omitted. Concurring opinions were delivered by Senators Benton, Maynard, Oliver, and Throop.

EDWARD WHEAT and Others v. LEMUEL CROSS

Maryland Court of Appeals, April Term, 1869

[*Reported in* 31 *Maryland*, 99]

Bartol, C. J., delivered the opinion of the Court.

This suit was brought by the appellee to recover the price of a horse sold to the appellants.

The plaintiff resided in Frostburg, and the defendants were engaged in the business of buying and selling horses in Baltimore. The contract of sale was made by correspondence between the parties through the mails.

The facts of the case, so far as it is material to state them, were as follows: On the 23d of August, 1867, the defendants received the horse in their possession, to be sold on commission, at that time apparently sound and in good condition. On the 12th of September, 1867, they addressed a letter to the plaintiff, stating that the horse had been sick, but is doing well at this time, and offering $140 for him clear of all expenses, and saying, "you can draw on us at sight for $140." This letter was received on the 15th or 16th of September; on the 16th the plaintiff signified his acceptance of the offer by drawing on the defendants for $140. The draft was sent on that day, and on the 17th the defendants refusing to pay the draft, it was protested.

On the 16th of September, the defendants addressed a letter to the plaintiff withdrawing their offer of the 12th, stating that "when they wrote they did not think the horse was so bad, but since it has turned out to be 'farcy,' they would not buy at any price," and directing him "not draw on them for the money, that they will not pay the draft until they see how the horse gets." This letter was not received by the plaintiff till after he had accepted the offer contained in the letter of the 12th, by sending the draft.

In the argument of the case two positions have been taken by the defence —

1st. That there was not such mutual assent between the parties as to constitute a binding contract.

2d. That the offer by the defendants was made through mistake of a material fact as to the condition of the horse, and the nature of the disease under which it was suffering; and was withdrawn as soon as the mistake was discovered, and the acceptance thereof was not binding upon them.[1]

1st. On the first question, we consider the law well settled that where parties are at a distance from each other, and treat by correspondence through the post, an offer made by one is a continuing offer until it is received, and its acceptance then completes the *aggregatio mentium* necessary to make a binding bargain. The bar-

[1] Part of the opinion, holding the mistake immaterial, is omitted.

gain is complete as soon as the letter is sent containing notice of acceptance. This rule applies where the offer and acceptance are unconditional.

The offer may be withdrawn, and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party; but if before that time the offer is accepted, the party making the offer is bound, and the withdrawal thereafter is too late.

In this case it appears the defendants' letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted, and it has been argued that the *onus* is on the plaintiff to show that the sending of the acceptance preceded the sending of the letter of withdrawal. This position is not correct; it is quite immaterial to inquire whether the defendants' letter of the 16th, or the draft of the same date, was first sent.

Until the notice of the withdrawal of the offer actually reached the plaintiff, the offer was continuing, and the acceptance thereof completed the contract.

This point was expressly decided in Tayloe *v.* Merchants' Fire Ins. Co., 9 Howard, 390. That was a case arising upon an insurance contract, but the reasoning of the Court on this question, and the principles decided, are applicable alike to all contracts made by correspondence between parties at a distance from each other. There the terms upon which the company was willing to insure were made known by letter, and it was held "that the contract was complete when the insured placed a letter in the post-office accepting the terms."

ELIASON ET AL. *v.* HENSHAW

SUPREME COURT OF THE UNITED STATES, Feb. 17, 20, 1819

[*Reported in* 4 *Wheaton,* 225, 4 *Curtis,* 382]

ERROR to the Circuit Court for the District of Columbia.

Jones and *Key,* for the plaintiff in error.

Swann, for the defendant in error.

WASHINGTON, J., delivered the opinion of the Court.

This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times in Georgetown, and

will be glad to serve you, either in receiving your flour in store when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs at Georgetown, and despatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th instant was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown by the first water, at $9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary, — payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the Court below, the plaintiffs in error, moved that Court to instruct the jury, that, if they believed the said evidence to be true as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of $9.50 per barrel. The Court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for. If they ought,

the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer they required an answer by the return of the wagon by which the letter was despatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this wagon in travelling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer; and, therefore, it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiffs' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour; and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the Court ought, there-

fore, to have given the instruction to the jury which was asked for.

Judgment reversed. Cause remanded, with directions to award a *venire facias de novo.*

SAMUEL P. WHITE, Respondent, *v.* JOHN W. CORLIES and JONATHAN N. TIFT, Appellants

New York Court of Appeals, November 17–20, 1871

[*Reported in* 26 *New York,* 467]

Appeal from judgment of the General Term of the first judicial district affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract.

The plaintiff was a builder, with his place of business in Fortieth Street, New York City.

The defendants were merchants at 32 Dey Street.

In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suite of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September twenty-eighth the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' book-keeper wrote the plaintiff the following note: —

New York, September 29th.

Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

The writer will call again, probably between five and six this P.M.

W. H. R.,
For J. W. Corlies & Co.
32 Dey Street.

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September twenty-ninth, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down

to Dey Street (meaning to give notice of assent) before commencing the work."

"In my opinion it was not. He had a right to act upon the note and commence the job, *and that was a binding contract between the parties.*"

To this defendants excepted.

L. Henry, for the appellants.

Mr. *Field,* for respondent.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail containing the acceptance. And in general, as soon as the answering letter is mailed the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which, in itself is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act, uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered,

or in his acts, that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer, and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur but ALLEN, J., not voting.

Judgment reversed and new trial ordered.[1]

THE GREAT NORTHERN RAILWAY COMPANY *v.* WITHAM

IN THE COMMON PLEAS, November 6, 1783

[*Reported in Law Reports, 9 Common Pleas,* 16]

THE cause was tried before BRETT, J., at the sittings at Westminster after the last term. The facts were as follows: In October, 1871, the plaintiffs advertised for tenders for the supply of goods (amongst other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows: —

I, the undersigned, hereby undertake to supply the Great Northern Railway Company, for twelve months from the 1st of November, 1871, to 31st of October, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's storekeeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side.

(Signed) SAMUEL WITHAM

[1] There are many cases where an acceptance, so called, did not complete the contract, because it imposed a new condition or slightly but materially varied the terms of the offer. See Honeyman *v.* Marryat, 6 H. L. C. 112; English, &c., Credit Co. *v.* Arduin, L. R. 5 H. L. 64; Appleby *v.* Johnson, L. R. 9 C. P. 158; Stanley *v.* Dowdeswell, L. R. 10 C. P. 102; Crossley *v.* Maycock, E. R. 18 Eq. 180; Jones *v.* Daniel, [1894] 2 Ch. 332; Lloyd *v.* Nowell, [1895] 2 Ch. 744; Ortman *v.* Weaver, 11 Fed. Rep. 358; Martin *v.* Northwestern Fuel Co., 22 Fed. Rep. 596; Coffin *v.* Portland, 43 Fed. Rep. 411; James *v.* Darby, 100 Fed. Rep. 224 (C. C. A.); Robinson *v.* Weller, 81 Ga. 704; Corcoran *v.* White, 117 Ill. 118; Middaugh *v.* Stough, 161 Ill. 312; Stagg *v.* Compton, 81 Ind. 171; Siebold *v.* Davis, 67 Ia. 560; Gilbert *v.* Baxter, 71 Ia. 327; Howard *v.* Industrial School, 78 Me. 230; Putnam *v.* Grace, 161 Mass. 237; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 379; Commercial Telegram Co. *v.* Smith 47 Hun, 494; Olds *v.* East Tenn. Stone Co. (Tenn.), 48 S. W. Rep. 333; North Texas Building Co. *v.* Coleman (Tex. Civ. App.), 58 S. W. Rep. 1044; Virginia Hot Springs Co. *v.* Harrison, 93 Va. 569; Baker *v.* Holt, 56 Wis. 100. And see 7 Am. & Eng. Encyc. of Law, 132. *Compare:* Hussey *v.* Horne Payne, 4 App. Cas. 311; Smith *v.* Webster, 3 Ch. D. 49; North *v.* Percival, [1898] 2 Ch. 128.

The company's officer wrote in reply as follows:—

Mr. S. Witham:

Sir, — I am instructed to inform you that my directors have accepted your tender, dated, &c., to supply this company at Doncaster station any quantity they may order during the period ending 31st of October, 1872, of the descriptions of iron mentioned on the inclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter,

(Signed) S. Fitch, *Assistant Secretary.*

To this the defendant replied: —

I beg to own receipt of your favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention.

S. Witham.

Several orders for iron were given by the company, which were from time to time duly executed by the defendant; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs, —

Digby Seymour, Q. C., moved to enter a nonsuit, on the ground that the contract was void for want of mutuality. He contended that, as the company did not bind themselves to take any iron whatever from the defendant, his promise to supply them with iron was a promise without consideration. He cited Lees *v.* Whitcomb, 5 Bing. 34; Burton *v.* Great Northern Railway Co., 9 Ex. 507, 23 L. J. (E.) 184; Sykes *v.* Dixon, 9 Ad. & Ex. 693; and Bealey *v.* Stuart, 7 H. & N. 753, 31 L. J. (Ex.) 281. *Cur. adv. vult.*

Brett, J. The company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices; and the company accepted his tender. If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it. This action is brought for the defendant's refusal to deliver goods ordered by the company; and the objection to the plaintiff's right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you 100*l*.," that is in a certain sense a unilateral contract. He has not promised to go to York; but if he goes it cannot be doubted that he will be entitled to receive the 100*l*. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron,

or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise.[1] So, here, the company having given the defendant an order at his request, his acceptance of the order would bind them. If any authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none has been cited. Burton *v.* Great Northern Railway Company, 9 Ex. 507, 23 L. J. (Ex.) 184, is not at all to the purpose. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.[2]

GROVE, J. I am of the same opinion, and have nothing to add.

Rule refused.[3]

THE CHICAGO AND GREAT EASTERN RAILWAY COMPANY, APPELLANT, *v.* FRANCIS B. DANE AND OTHERS, RESPONDENTS

NEW YORK COURT OF APPEALS, December 13–20, 1870

[*Reported in* 43 *New York,* 240]

THIS is an appeal from a judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment for the defendant entered upon the report of a referee.

This action was brought to recover damages on an alleged contract of the defendant to carry and transport a quantity of railroad iron from New York to Chicago for the plaintiffs. The only evidence of the contract were the letters quoted in the opinion of the court. The defendant insisted that the agreement was invalid for want of the proper U. S. internal revenue stamp affixed at the time it was made. But the referee overruled the objection, holding that it was sufficient under section 173 of the Revenue Act of June 30, 1864, to stamp the instrument on its production in court. This point was not passed on in this court.

[1] "It would be an ordinary case of a unilateral contract growing out of an offer of one party to do something if the other will do or refrain from doing something else. If the party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer is unnecessary. Lent *v.* Padelford, 10 Mass. 230; Train *v.* Gold, 5 Pick. 380; Brogden *v.* Metropolitan Railway, 2 App. Cas. 666, 691; Weaver *v.* Wood, 9 Pa. 220; Patton *v.* Hassinger, 69 Pa. 311." Knowlton, J., in First Nat. Bank *v.* Watkins, 154 Mass. 385, 387.

[2] See Queen *v.* Demers, [1900] A. C. 103; Ford *v.* Newth, [1901] 1 K. B. 683; Attorney-General *v.* Stewards, 18 T. L. R. 131.

[3] A statement of the pleadings and the concurring opinion of KEATING, J., are omitted.

In the original, "it" has an antecedent to which the rest of the statement correctly applies; it was

Titus and *Westervelt,* for the appellant.

H. W. Johnson, for the respondents.

GROVER, J. Whether the letter of the defendants to plaintiff, and the answer of plaintiff thereto (leaving the question of revenue stamps out of view), proved a legal contract for the transportation of iron by the defendants for the plaintiff from New York to Chicago upon the terms therein specified, depends upon the question whether the plaintiff became thereby bound to furnish any iron to the defendants for such transportation, as there was no pretence of any consideration for the promise of the defendants to transport the iron, except the mutual promise of the plaintiff to furnish it for that purpose, and to pay the specified price for the service. Unless, therefore, there was a valid undertaking by the plaintiff so to furnish the iron, the promise of the defendants was a mere nude pact, for the breach of which no action can be maintained. The material part of the defendants' letter affecting this question is as follows: "We hereby agree to receive in this port (New York), either from yard or vessel, and transport to Chicago, by canal and rail or the lakes, for and on account of the Chicago and Great Eastern Railway Company, not exceeding six thousand tons gross (2,240 lbs.) in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified." This letter was forwarded by the defendants to the plaintiff April 15, 1864. On the 16th of April, the plaintiff answered this letter, the material part of which was as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms." We have seen that the inquiry is, whether this bound the plaintiff to furnish any iron for transportation. It is manifest that the word "agree" in the letter of the defendants was used as synonymous with the word "offer," and that the letter was a mere proposition to the plaintiff for a contract to transport for it any quantity of iron upon the terms specified, not exceeding 6,000 tons, and that it was so understood by the plaintiff. The plaintiff was at liberty to accept this proposition for any specified quantity not beyond that limited; and had it done so, a contract mutually obligatory would have resulted therefrom, for the breach of which by either party the other could have maintained an action for the recovery of the damages thereby sustained. This mutual obligation of the parties to perform the contract would have constituted a consideration for the promise of each. But the plaintiff did not so accept. Upon the receipt of the defendants' offer to transport not to exceed 6,000 tons upon the terms specified, it merely accepted such offer, and agreed to be bound by its terms. This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the

plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any. But there was no consideration received by the defendants for giving any such option to the plaintiff. There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promises furnishes no foundation for an action. The counsel for the plaintiff insists that the contract may be upheld for the reason that at the time the letters were written the defendants were engaged in transporting iron for the plaintiff. But this had no connection with the letters any more than if the defendants were at the time employed in any other service for the plaintiff. Nor does the fact that the defendants, after the letters were written, transported iron for the plaintiff at all aid in upholding the contract. This did not oblige the plaintiff to furnish any additional quantity, and consequently constituted no consideration for a promise to transport any such. The counsel for the appellant further insists that the letter of defendant was a continuing offer, and that the request of the plaintiff, in August, to receive and transport a specified quantity of iron was an acceptance of such offer, and that the promises then became mutually obligatory, if not so before. This position cannot be maintained. Upon receipt of the defendants' letter, the plaintiff was bound to accept in a reasonable time and give notice thereof, or the defendant was no longer bound by the offer. The judgment appealed from must be affirmed with costs.

All the judges concurring, except Allen, J., who, having been of counsel, did not sit. *Judgment affirmed.*[1]

OTIS F. WOOD, Appellant, *v.* LUCY, LADY DUFF GORDON, Respondent

New York Court of Appeals, November 14–December 4, 1917

[*Reported in* 222 *New York,* 88]

Cardozo, J. The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return, she was to have one-half

[1] See Thayer *v.* Burchard, 99 Mass. 508.

of "all the profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of ninety days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed. (SCOTT, J., in McCall Co. *v.* Wright, 133 App. Div. 62; Moran *v.* Standard Oil Co., 211 N. Y. 187, 198.) If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an *exclusive* privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. (Phœnix Hermetic Co. *v.* Filtrine Mfg. Co., 164 App. Div. 424; W. G. Taylor Co. *v.* Bannerman, 120 Wis. 189; Mueller *v.* Bethesda Mineral Spring Co., 88 Mich. 390.) We are not to suppose that one party was to be placed at the mercy of the other (Hearn *v.* Stevens & Bro., 11 App. Div. 101, 106; Russell *v.* Allerton, 108 N. Y. 288). Many other terms of the agreement point the same way. We are told at the outset by way of recital that "the said Otis F. Wood possessed a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon has approved." The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business "efficiency as both parties must have intended that at all events it should have" (BOWEN, L. J., in The Moorcock, 14 P. D. 64, 68). But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and

tradesmark as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties, the promise *has* a value. It helps to enforce the conclusion that the plaintiff *had* some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion, the authorities are ample. (Wilson *v.* Mechanical Orguinette Co., 170 N. Y. 542; Phœnix Hermetic Co. *v.* Filtrine Mfg. Co., *supra;* Jacquin *v.* Boutard, 89 Hun, 437; 157 N. Y. 686; Moran *v.* Standard Oil Co., *supra;* City of N. Y. *v.* Paoli, 202 N. Y. 18; M'Intyre *v.* Belcher, 14 C. B. (N. S.) 654; Devonald *v.* Rosser & Sons, 1906, 2 K. B. 728; W. G. Taylor Co. *v.* Bannerman, *supra;* Mueller *v.* Bethesda Mineral Spring Co., *supra;* Baker Transfer Co. *v.* Merchants' R. & I. Mfg. Co., 1 App. Div. 507.)

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

Cuddeback, McLaughlin and Andrews, JJ., concur; Hiscock, Ch. J., Chase and Crane, JJ., dissent.

Judgment reversed, etc.

JOYNSON *v.* HUNT & SON

In the Court of Appeal, July 26, 1905

[*Reported in* 93 *Law Times* (N. S.) 470]

The defendants carried on business in the glove trade; and the plaintiff was a commission agent.

On the 18th July 1902 the defendants wrote the following letter to the plaintiff:

> In reply to your favour I beg to say we will give the 2½ per cent. commission on all business you do for us in London, whether you send the buyers to buy or orders come through the post, or you take them and send them direct. You let us know to whom you show our samples, and, if business results from the transaction, we will forward your commission quarterly as you suggest. This refers to orders executed.

The defendants gave samples to the plaintiff, and the plaintiff obtained orders for the defendants.

Subsequently the defendants terminated the agency of the plaintiff without giving any notice; and thereupon the plaintiff brought this action to recover damages.

At the trial before Lawrence, J. with a jury, the plaintiff tendered the evidence of witnesses to prove that there was a custom in the glove trade that six months' notice must be given to terminate the

agency of a commission agent. The learned judge held that the defendants were entitled to terminate the agency without notice, and rejected the evidence of the alleged custom; and he directed a verdict and judgment to be entered for the defendants.

The plaintiff appealed, asking for judgment or for a new trial.

Romer, L. J.: I desire to make it clear that it is quite possible that a good custom might be pleaded and proved as to notice being necessary to terminate an ordinary contract where the principal employs the agent to sell on commission. This case, however, turns upon the special terms of the contract between these parties. In my opinion that contract does not show any employment by the defendants of the plaintiff at all. It is only an arrangement that the plaintiff might obtain orders for the defendants if he thought fit to do so, and that if he did obtain orders the defendants might accept them if they thought fit to do so, and that if business resulted commission would be paid to the plaintiff. In my opinion this was not an employment by a principal of an agent at all. It was simply a purely voluntary arrangement on the part of principal and agent, neither party being bound to do anything. From the very nature of the arrangement made in writing, it follows that either party may cause it to cease at any time. To import into it any custom as to notice would be inconsistent with the special terms of the arrangement. I agree that the appeal fails.[1]

MICHAEL A. CAVANAUGH, and Another, *v.* D. W. RANLET COMPANY

Supreme Judicial Court of Massachusetts, November 16–February 27, 1918

[*Reported in* 229 *Massachusetts,* 366]

Action for breach of a contract to deliver a carload of straight clipped white oats guaranteed to be "cool and sweet," or for the recovery of $537.93 paid by the plaintiff for a carload of inferior oats which he had no opportunity to inspect.

After a conversation by telephone, the defendant sent by mail to the plaintiffs a paper called in the record a "confirmation" of the telephone conversation, which stated that a certain shipment of clipped white oats had been sold to Cavanaugh Brothers, "Arr. cool and sweet." The printed form on which this so-called confirmation was made out contained in print at the bottom the following:

This sale subject to rules of Boston Chamber of Commerce governing trade in grain.

State or official board of trade, inspection and test weights shall be final.

[1] Collins, M. R. and Mathews, L. J. delivered concurring opinions.

This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire.

If any error in above please advise by return mail.

We thank you for the order.

Yours truly,

THE D. W. RANLET CO.,

Per....SMITH.....

No answer was sent by the plaintiffs.

The plaintiff paid a draft for the price on tender of a bill of lading. On arrival the oats were found not cool and sweet, but the defendant contended that notice of the defect was not given within the time required by the rules of the Boston Chamber of Commerce.

At the close of the evidence the Judge ordered a verdict for the defendant and reported the case for determination by this court; the parties stipulating that if the jury would have been warranted in returning a verdict for the plaintiff, judgment should be entered for him in the sum of $645.52.

BRALEY, J.: If the paper sent by defendant to the plaintiffs is examined, the word "confirmation" is not found. It purports to be a memorandum of a sale of two cars "straight clipped white oats," one of which is the car in question, with a statement of the price, warranty and terms of shipment. It does not purport to confirm the oral contract. It is of itself an offer to sell which upon acceptance by the offerees would become a binding sale. The words, "This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire. If any error in above please advise by return mail," immediately preceding the defendant's signature, admit of no other satisfactory construction. It could not be ruled as matter of law, that, if the "confirmation" were treated as an offer, it became a binding agreement from the failure of the plaintiffs to reply. The jury under all the circumstances were to say whether the plaintiffs' silence amounted to an assent. Quintard *v.* Bacon, 99 Mass. 185. Borrowscale *v.* Bosworth, 99 Mass. 378. Metropolitan Coal Co. *v.* Boutell Transportation & Towing Co. 185 Mass. 391, 395. If the jury found the oral contract had not been established, then, if accepted by the plaintiffs, the "confirmation" would constitute the contract. Metropolitan Coal Co. *v.* Boutell Transportation & Towing Co. *ubi supra.* But, if they found the oral contract had been proved, the further question, whether that contract had been mutually modified, rescinded or abandoned, was a question of fact under suitable instructions. Hanson & Parker, Ltd. *v.* Wittenberg, 205 Mass. 319, 326, and cases cited.

Judgment for the plaintiff in the agreed sum was ordered.[1]

[1] The statement of facts is abbreviated and a portion of the opinion omitted.

JOHN F. WHEELER AND ANOTHER *v.* A. W. KLAHOLT AND ANOTHER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 7–March 1, 1901

[*Reported in* 178 *Massachusetts,* 141]

HOLMES, C. J. This is an action for the price of one hundred and seventy-four pairs of shoes, and the question raised by the defendants' exception is whether there was any evidence, at the trial, of a purchase by the defendants.[1]

The evidence of the sale was this. The shoes had been sent to the defendants on the understanding that a bargain had been made. It turned out that the parties disagreed, and if any contract had been made it was repudiated by them both. Then, on September 11, 1899, the plaintiffs wrote to the defendants that they had written to their agent, Young, to inform the defendants that the latter might keep the goods "at the price you offer if you send us net spot cash at once. If you cannot send us cash draft by return mail, please return the goods to us immediately via Wabash & Fitchburg Railroad, otherwise they will go through New York City and it would take three or four weeks to get them." On September 15, the defendants enclosed a draft for the price less four per cent, which they said was the proposition made by Young. On September 18 the plaintiffs replied, returning the draft, saying that there was no deduction of four per cent, and adding, "if not satisfactory please return the goods at once by freight via Wabash & Fitchburg Railroad." This letter was received by the defendants on or before September 20, but the plaintiffs heard nothing more until October 25, when they were notified by the railroad company that the goods were in Boston.

It should be added that when the goods were sent to the defendants they were in good condition, new, fresh, and well packed, and that when the plaintiffs opened the returned cases their contents were more or less defaced and some pairs of shoes were gone. It fairly might be inferred that the cases had been opened and the contents tumbled about by the defendants, although whether before or after the plaintiffs' final offer perhaps would be little more than a guess.

Both parties invoke Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, the defendants for the suggestion on p. 197 that a stranger by sending goods to another cannot impose a duty of notification upon him at the risk of finding himself a purchaser against his own will. We are of opinion that this proposition gives the defendants no help. The parties were not strangers to each other. The goods had not been foisted upon the defendants, but were in their custody presumably by their previous assent, at all events by their assent implied by their later conduct. The relations between the parties were

[1] A part of the opinion relating to a question of practice is omitted.

so far similar to those in the case cited, that if the plaintiffs' offer had been simply to let the defendants have the shoes at the price named, with an alternative request to send them back at once, as in their letters, the decision would have applied, and a silent retention of the shoes for an unreasonable time would have been an acceptance of the plaintiffs' terms, or, at least would have warranted a finding that it was. See also Bohn Manuf. Co. v. Sawyer, 169 Mass. 477.

The defendants seek to escape the effect of the foregoing principle, if held applicable, on the ground of the terms offered by the plaintiffs. They say that those terms made it impossible to accept the plaintiffs' offer, or to give the plaintiffs any reasonable ground for understanding that their offer was accepted, otherwise than by promptly forwarding the cash. They say that whatever other liabilities they may have incurred they could not have purported to accept an offer to sell for cash on the spot by simply keeping the goods. But this argument appears to us to take one half of the plaintiffs' proposition with excessive nicety, and to ignore the alternative. Probably the offer could have been accepted and the bargain have been made complete before sending on the cash. At all events we must not forget the alternative, which was the immediate return of the goods.

The evidence warranted a finding that the defendants did not return the goods immediately or within a reasonable time, although subject to a duty in regard to them. The case does not stand as a simple offer to sell for cash received in silence, but as an alternative offer and demand to and upon one who was subject to a duty to return the goods, allowing him either to buy for cash or to return the shoes at once, followed by a failure on his part to do anything. Under such circumstances a jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell, although coupled with a failure to show that promptness on which the plaintiffs had a right to insist if they saw fit, but which they also were at liberty to waive.

Exceptions overruled.

PRESCOTT v. JONES, ET AL.

NEW HAMPSHIRE SUPREME COURT, June, 1898

[*Reported in* 69 *New Hampshire,* 305]

ASSUMPSIT. The declaration alleged, in substance, that the defendants, as insurance agents, had insured the plaintiff's buildings in the Manchester Fire Insurance Company until February 1, 1897; that on January 23, 1897, they notified him that they would renew the policy and insure his buildings for a further term of one year

from February 1, 1897, in the sum of $500, unless notified to the contrary by him; that he, relying on the promise to insure unless notified to the contrary, and believing, as he had a right to believe, that the buildings would be insured by the defendants for one year from February 1, 1897, gave no notice to them to insure or not to insure; that they did not insure the buildings as they had agreed and did not notify him of their intention not to do so; that the buildings were destroyed by fire March 1, 1897, without fault on the plaintiff's part. The defendants demurred.

John T. Bartlett, Burnham, Brown & Warren, and *Isaac W. Smith,* for the plaintiff.

Drury & Peaslee, for the defendants.

BLODGETT, J. While an offer will not mature into a complete and effectual contract until it is acceded to by the party to whom it is made and notice thereof, either actual or constructive, given to the maker (Abbot *v.* Shepard, 48 N. H. 14, 17; Perry *v.* Insurance Co., 67 N. H. 291, 294, 295), it must be conceded to be within the power of the maker to prescribe a particular form or mode of acceptance; and the defendants having designated in their offer what they would recognize as notice of its acceptance, namely, failure of the plaintiff to notify them to the contrary, they may properly be held to have waived the necessity of formally communicating to them the fact of its acceptance by him.

But this did not render acceptance on his part any less necessary than it would have been if no particular form of acceptance had been prescribed, for it is well settled that "a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it." Clark Cont. 31, 32. "A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract." More *v.* Insurance Co., 130 N. Y. 537, 547. And to constitute acceptance, "there must be words, written or spoken, or some other overt act." Bish. Cont., s. 329, and authorities cited.

If, therefore, the defendants might and did make their offers in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it merely because he did not communicate his intention not to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because "it takes two to make a bargain," and as contracts rest on mutual promises, both parties are bound, or neither is bound.

The inquiry as to the defendants' liability for the non-performance of their offer thus becomes restricted to the question, Did the plaintiff accept the offer, so that it became by his action clothed with

legal consideration and perfected with the requisite condition of mutuality? As, in morals, one who creates an expectation in another by a gratuitous promise is doubtless bound to make the expectation good, it is perhaps to be regretted that, upon the facts before us, we are constrained to answer the question in the negative. While a gratuitous undertaking is binding in honor, it does not create a legal responsibility. Whether wisely and equitably or not, the law requires a consideration for those promises which it will enforce; and as the plaintiff paid no premium for the policy which the defendants proposed to issue, nor bound himself to pay any, there was no legal consideration for their promise, and the law will not enforce it.

Then, again, there was no mutuality between the parties. All the plaintiff did was merely to determine in his own mind that he would accept the offer — for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any right in his favor as against the defendants. From the very nature of a contract this must be so; and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract.

Nor is there any estoppel against the defendants, on the ground that the plaintiff relied upon their letter and believed they would insure his buildings as therein stated.

The letter was a representation only of a present intention or purpose on their part. "It was not a statement of a fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct. . . . The intent of a party, however positive or fixed, concerning his future action, is necessarily uncertain as to its fulfilment, and must depend on contingencies and be subject to be changed and modified by subsequent events and circumstances. . . . On a representation concerning such a matter no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed, certain, and definite fact or state of things, permanent in its nature and not liable to change. . . . The doctrine of estoppel . . . on the ground that it is contrary to a previous statement of a party does not apply to such a representation. The reason on which the doctrine rests is, that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition, to his prejudice, on the faith of such previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action."

Langdon *v.* Doud, 10 Allen, 433, 436, 437, Jackson *v.* Allen, 120 Mass. 64, 79; Jorden *v.* Money, 5 H. L. Cas. 185.

"An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." Insurance Co. *v.* Mowry, 96 U. S. 544, 547. "The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention by the person with whom he is dealing." Ib. 548. See, in addition: White *v.* Ashton, 51 N. Y. 280; Mason *v.* Bridge Co., 28 W. Va. 639, 649; Jones *v.* Parker, 67 Tex. 76, 81, 82; Big. Estop. (5th ed.) 574.

To sum it up in a few words, the case presented is, in its legal aspects, one of a party seeking to reap where he had not sown, and to gather where he had not scattered. *Demurrer sustained.*[1]

Peaslee, J., did not sit: the others concurred.

AUGUSTUS L. PHILLIPS, by his Guardian, *v.* GEORGE L. MOOR

Supreme Judicial Court of Maine, March 8, 1880

[*Reported in* 71 *Maine,* 78]

Barrows, J.[2] Negotiations by letter, looking to the purchase by the defendant of a quantity of hay in the plaintiff's barn, had resulted in the pressing of the hay by the defendant's men, to be paid for at a certain rate if the terms of sale could not be agreed on; and in written invitations from plaintiff's guardian to defendant, to make an offer for the hay, in one of which he says: "If the price is satisfactory I will write you on receipt of it;" and in the other: "If your offer is satisfactory I shall accept it; if not, I will send you the money for pressing." Friday, June 14th, defendant made an examination of the hay after it had been pressed, and wrote to plaintiff's guardian, same day . . . "Will give $9.50 per ton, for all but three tons, and for that I will give $5.00." Plaintiff's guardian lived in Carmel, fourteen miles from Bangor, where defendant lived, and there is a daily mail communication each way between the two places. The card containing defendant's offer was mailed at Bangor, June 15, and probably received by plaintiff in regular course, about nine o'clock A.M. that day. The plaintiff does not deny this, though he says he does not always go to the office, and the mail is sometimes carried by. Receiving no better offer, and

[1] Felthouse *v.* Bindley, 11 C. B. N. S. 868, *acc.*

[2] A portion of the opinion is omitted in which it was held that on the completion of the contract, title to the hay passed to the buyer.

being offered less by another dealer, on Thursday, June 20th, he went to Bangor, and there, not meeting the defendant, sent him through the post-office a card, in which he says he was in hopes defendant would have paid him $10.00 for the best quality: "But you can take the hay at your offer, and when you get it hauled in, if you can pay the $10.00 I would like to have you do it, if the hay proves good enough for the price." Defendant received this card that night or the next morning, made no reply, and Sunday morning the hay was burnt in the barn. Shortly after, when the parties met, the plaintiff claimed the price of the hay and defendant denied his liability, and asserted a claim for the pressing. Hence this suit.

The guardian's acceptance of the defendant's offer was absolute and unconditional. It is not in any legal sense qualified by the expression of his hopes, as to what the defendant would have done, or what he would like to have him do, if the hay when hauled proved good enough. Aside from all this, the defendant was told that he could take the hay at his own offer. It seems to have been the intention and understanding of both the parties that the property should pass. The defendant does not deny what the guardian testifies he told him at their conference after the hay was burned, — that he had agreed with a man to haul the hay for sixty cents a ton. The guardian does not seem to have claimed any lien for the price, or to have expected payment until the hay should have been hauled by the defendant. But the defendant insists that the guardian's acceptance of his offer was not seasonable; that in the initiatory correspondence the guardian had in substance promised an immediate acceptance or rejection of such offer as he might make, and that the offer was not, in fact, accepted within a reasonable time.

If it be conceded that for want of a more prompt acceptance the defendant had the right to retract his offer, or to refuse to be bound by it when notified of its acceptance, still the defendant did not avail himself of such right. Two days elapsed before the fire after the defendant had actual notice that his offer was accepted, and he permitted the guardian to consider it sold, and made a bargain with a third party to haul it.

It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time. Peru *v.* Turner, 10 Maine, 185; but if the party to whom it is made, makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late.[1]

[1] "In the instruction the Court ruled, in effect, that the acceptance became binding upon the parties, unless the plaintiff immediately notified the defendant that he had withdrawn his offer. The rule now supported by the great preponderance of authority, and almost, if not quite, universally adhered to, is that, when a proposal is accepted by letter, the contract is deemed to become complete when the letter is mailed, pro-

SECTION II

CONSIDERATION

A. — Early Development

ANONYMOUS

In the Common Pleas, Michaelmas Term, 1504

[*Reported in Keilwey, 77 placitum,* 25]

In action of trespass on the case the plaintiff counted that he had bought of the defendant twenty quarters of malt for a certain sum of money paid beforehand, and he left it with the defendant to safely keep to the use of the plaintiff until a certain day now passed, and to do this the defendant *super se assumpsit.* Before the day the defendant from the good custody of the defendant himself had converted the said malt to his own use, to the injury and damage of the plaintiff, &c. *More.* The plaintiff has counted that he bought twenty quarters of malt and has not shown that it was in sacks, so by the purchase no property was passed, for the plaintiff cannot take this malt from the storehouse of the defendant because of such a purchase of uncertain malt, nor can he have action of

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vided the offer is standing, and the acceptance is made within a reasonable time. . . . It will be seen that the rule is sharply defined. The instruction given seems to us to be a departure from it. It assumes that the contract in the case at bar was not necessarily complete when the letter of acceptance was mailed, and that no contract would have been made, if the plaintiff immediately upon the receipt of the letter had notified the defendant that the offer was withdrawn. The departure from the recognized rule must have been deemed called for upon the ground that the letter of acceptance was not mailed within a reasonable time. The court, doubtless, assumed the rule to be, that a contract by the correspondence is not completed by the mailing of the letter of acceptance, where that is not done, within a reasonable time. . . . Taking this to be the rule, we have to inquire whether an acceptance after the time limited, or, in the absence of an express limitation, after the lapse of a reasonable time, imposes upon the person making the offer any obligation. The theory of the court below seems to have been that it does. But in our opinion it does not. The offer, unless sooner withdrawn, stands during the time limited, or, if there is no express limitation, during a reasonable time. Until the end of that time the offer is regarded as being constantly repeated. Chitty on Cont. (11th ed.), 17. After that there is no offer, and, properly considered, nothing to withdraw. The time having expired, there is nothing which the acceptor can do to revive the offer, or produce an extension of time." Ferrier *v.* Storer, 63 Ia. 484, 487. See also Maclay *v.* Harvey, 90 Ill. 525.

[The offeror when he has received an acceptance which is too late] "would act prudently and fairly if he informed his correspondent that he had given up the transaction and was no longer disposed to bind himself by the agreement in regard to which he had at first taken the initiative. Otherwise, indeed, his silence might be considered as importing tacit assent to the proposition *ex novo* contained in the late acceptance. . . . These considerations have such force that they have led to some legislation imposing on every one who has made an offer by correspondence the duty to inform his correspondent that the acceptance has arrived too late. German Commercial Code, Art. 319; Swiss Federal Code of Obligations, Art. 5;" Valéry Contrats par Correspondance, § 203.

detinue, nor, for the same reason, action on the case, but as the case is here he is put to his action of debt for the malt. And the matter was discussed at the bar, and then by all the bench. On which FROWIKE said: Truly the case is good, and many good cases touching the matter have been put; nevertheless the words at the purchase are the whole matter. As, if a man sells me one of his horses in his stable, and grants further that he will deliver the horse to me by a certain day, I shall not take the horse without his delivery. But if he sells to me one of his horses within his stable for a certain sum of money paid beforehand, I can take the horse — that is such horse as pleases me — without any delivery. And in both cases if he aliens or converts all his horses to his own use so that I cannot have my bargain carried out, I shall have action on my case against him because of the payment of the money. And so if I sell ten acres of land, parcel of my manor, and then I make feoffment of the manor, you will have good action against me on your case because of the receipt of your money, and in this case you have no other remedy against me. And so if I sell you certain land, and I covenant further to enfeoff you by a certain day and do not, you will have good action on the case, and that is adjudged. And so if I sell you twenty oaks from my wood for money paid, and then I alien the wood, action on the case lies. And so if I deliver money to his own use, I can elect to have action of account against him or action on my case; but the stranger has no other remedy except action of account. And so if I bail my goods to a man to safely keep, and he takes the custody upon him, and my goods for lack of good custody are lost or destroyed, I shall have action of detinue, or on my case at my pleasure, and shall charge him by this word *super se assumpsit*. And if I make use of my action of detinue and he wages his law, I shall be barred in action on my case, because since I had liberty to elect action of detinue it was at my peril, and I have lost the advantage of the action on my case, and this is adjudged. As, if I hold an acre of land by fealty, twenty shillings of rent, or by a hawk or a rose, in the disjunctive, in this case before the rent day I have liberty to pay the hawk, rose, or otherwise the twenty shillings, at my pleasure. And if I covenant with a carpenter to build a house and pay him twenty pounds for the house to be built by a certain day, now I shall have good action on my case because of payment of my money, and still it sounds only in covenant, and without payment of money in this case no remedy; and still if he builds it and misbuilds it, action on my case lies. And also for nonfeasance, if the money is paid action on the case lies. And hence it seems to me in the case at bar the payment of the money is the cause of the action on the case without any passing of any property, &c., *et adjournatur*, &c.[1]

[1] The stages in the early development of assumpsit are shown in Professor Ames's articles on The History of Assumpsit, 2 Harv. L. Rev. 1, 53.

HUNT *v.* BATE

EASTER TERM, 1568

[*Reported in Dyer,* 272]

THE servant of a man was arrested, and imprisoned in the Compter in London for trespass; and he was let to mainprize by the manucaption of two citizens of London (who were all acquainted with the master), in consideration that the business of the master should not go undone. And afterwards, before judgment and condemnation, the master upon the said friendly consideration promised and undertook to one of the mainpernors to save him harmless against the party plaintiff from all damages and costs, if any should be adjudged, as happened afterwards in reality; whereupon the surety was compelled to pay the condemnation, *sc.* 31*l.*, &c. And thereupon he brought an action on the case, and the undertaking was traversed by the master, and found in London at *nisi prius* against him. And now in arrest of judgment it was moved that the action does not lie. And by the opinion of the Court it does not lie in this matter, because there is no consideration whereupon the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. Wherefore, &c.

But in another like action on the case, brought upon a promise of 20*l.* made to the plaintiff by the defendant, in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant.[1] And land may be also given in frank-marriage with the cousin of the donor as well after the marriage as before, because the marriage may be intended the cause, &c. And therefore the opinion of the Court in this case this Term was, that the plaintiff should recover upon the verdict, &c. And so note the diversity between the aforesaid cases.

SMITH AND SMITH'S CASE

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1583

[*Reported in* 3 *Leonard,* 88]

LAMBERT SMITH, executor of Tho. Smith, brought an action upon the case against John Smith, that whereas the testator, having divers

[1] Riggs *v.* Bullingham, Cro. Eliz. 715; Bosden *v.* Thinne, Yelv. 40; Field *v.* Dale, 1 Rolle's Ab. 11, plac. 8; Townsend *v.* Hunt, Cro. Car. 418; Oliverson *v.* Wood, 3 Lev. 419, *acc.*

children infants, and lying sick of a mortal sickness, being careful to provide for his said children infants, the defendant, in consideration the testator would commit the education of his children, and the disposition of his goods after his death, during the minority of his said children, for the education of the said children, to him, promised to the testator to procure the assurance of certain customary lands to one of the children of the said testator; and declared further, that the testator thereupon constituted the defendant overseer of his will, and ordained and appointed by his will that his goods should be in the disposition of the defendant, and that the testator died, and that by reason of that will, the goods of the testator to such a value came to the defendant's hands to his great profit and advantage. And upon *non assumpsit* pleaded, it was found for the plaintiff. And upon exception to the declaration in arrest of judgment for want of sufficient consideration, it was said by WRAY, C. J., that here is not any benefit to the defendant that should be a consideration in law to induce him to make this promise; for the consideration is no other but to have the disposition of the goods of the testator *pro educatione liberorum.* For all the disposition is for the profit of the children; and notwithstanding that such overseers commonly make gain of such disposition, yet the same is against the intendment of the law, which presumes every man to be true and faithful if the contrary be not showed; and therefore the law shall intend that the defendant hath not made any private gain to himself, but that he hath disposed of the goods of the testator to the use and benefit of his children according to the trust reposed in him. Which AYLIFFE, J., granted; GAWDY, J., was of the contrary opinion. And afterwards by award of the Court it was that the plaintiff *nihil capiat per billam.*

SIDENHAM AND WORLINGTON

IN THE COMMON PLEAS, EASTER TERM, 1585

[*Reported in* 2 *Leonard,* 224]

IN an action upon the case upon a promise, the plaintiff declared that he, at the request of the defendant, was surety and bail for J. S., who was arrested in the King's Bench upon an action of 30*l.*, and that afterwards, for the default of J. S., he was constrained to pay the 30*l.*; after which the defendant, meeting with the plaintiff, promised him for the same consideration that he would repay that 30*l.*, which he did not pay; upon which the plaintiff brought the action. The defendant pleaded *non assumpsit,* upon which issue was joined, which was found for the plaintiff. *Walmesley,* Serjt., for the defendant, moved the Court that this consideration will not maintain the action, because the consideration and promise did not concur and go together; for the consideration was long before exe-

cuted, so as now it cannot be intended that the promise was for the same consideration: as if one giveth me a horse, and a month after I promise him 10*l.* for the said horse, he shall never have debt for the 10*l.*, nor assumpsit upon that promise; for there it is neither contract nor consideration, because the same is executed. ANDERSON. This action will not lie; for it is but a bare agreement and *nudum pactum,* because the contract was determined, and not *in esse* at the time of the promise; but he said it is otherwise upon a consideration of marriage of one of his cousins, for marriage is always a present consideration. WINDHAM agreed with ANDERSON, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold. PERIAM, J., conceived that the action did well lie; and he said that this case is not like unto the cases which have been put of the other side: for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration and the promise and the sale ought to meet together; for a contract is derived from *con* and *trahere,* which is a drawing together, so as in contracts every thing which is requisite ought to concur and meet together, viz., the consideration of the one side, and the sale or the promise on the other side. But to maintain an action upon an assumpsit, the same is not requisite, for it is sufficient if there be a moving cause or consideration precedent; for which cause or consideration the promise was made; and such is the common practice at this day. For in an action upon the case upon a promise, the declaration is laid that the defendant, for and in consideration of 20*l.* to him paid (*postea scil.*), that is to say, at a day after *super se assumpsit,* and that is good; and yet there the consideration is laid to be executed. And he said that the case in Dyer, 10 Eliz. 272, would prove the case. For there the case was, that the apprentice of one Hunt was arrested when his master Hunt was in the country, and one Baker, one of the neighbors of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt. Afterwards Hunt, the master, returning out of the country, thanked Baker for his neighborly kindness to his apprentice, and promised him that he would repay him the sum which he had paid for his servant and apprentice: and afterwards, upon that promise, Baker brought an action upon the case against Hunt, and it was adjudged in that case that the action would not lie, because the consideration was precedent to the promise, because it was executed and determined long before. But in that case it was holden by all the justices that if Hunt had requested Baker to have been surety or bail, and afterwards Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant. RHODES, J., agreed with PERIAM;

and he said that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him 20*l.* for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master *ex abundanti* doth promise him 10*l.* more after his service ended, he shall not maintain an action for that 10*l.* upon the said promise; for there is not any new cause of consideration preceding the promise; which difference was agreed by all the justices; and afterwards, upon good and long advice, and consideration had of the principal case, judgment was given for the plaintiff; and they much relied upon the case of Hunt and Baker, 10 Eliz., Dyer, 272.

CRIPPS *v.* GOLDING

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1586

[*Reported in* 1 *Rolle's Abridgment,* 30]

IF a man, in consideration of a surrender and of 10*l.* paid, promises to do such a thing, although the surrender cannot be made, so that that consideration is void, yet the action is maintainable upon the other consideration.[1]

SIR ANTHONY STURLYN *v.* ALBANY

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1587

[*Reported in Croke Elizabeth,* 67]

ASSUMPSIT. The case was, the plaintiff had made a lease to J. S. of land for life, rendering rent. J. S. grants all his estate to the defendant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could show to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff allegeth that upon such a day of, &c., at Warwick, he showed unto him the indenture of lease by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to so much as the rent and arrearages did amount unto. And it was moved in arrest of judgment, that there was no consideration to ground an action; for it is but the showing of the deed, which is no consideration. 2. The damages ought only to be assessed

[1] In 1 Leon, 296, s. c. *nom.* Crisp and Golding's Case, it was said by Coke, *arguendo:* "Where two or many considerations are put in a declaration, although some be void, yet if one be good, the action well lieth, and damages shall be taxed accordingly." Bradburne *v.* Bradburne, Cro. El. 149; Colston *v.* Carre, 1 Rolle's Ab. 30, Cro. El. 847; Crisp *v.* Gamel, Cro. Jac. 128; Best *v.* Jolly, 1 Sid. 38, *acc.*

for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the showing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in damages. But they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.

Nota. In this case it was alleged that it hath been adjudged, when one assumeth to another, that if he can show him an obligation in which he was bound to him, that he would pay him, and he did show the obligation, &c., that no action lieth upon this assumpsit; which was affirmed by the justices.

STRANGBOROUGH AND WARNER

In the Queen's Bench, 1588 or 1589

[*Reported in* 4 *Leonard,* 3]

Note. That a promise against a promise will maintain an action upon the case, as in consideration that you do give to me 10*l.* on such a day, I promise to give you 10*l.* such a day after.[1]

JEREMY *v.* GOOCHMAN

In the Common Pleas, Michaelmas Term, 1595

[*Reported in Croke Elizabeth,* 442]

Assumpsit. And declares that, in consideration *quod deliberasset et dedisset* to the defendant twenty sheep, he assumed to pay unto him five pounds at the time of his marriage; and alleged *in facto* that he was married, &c. The issue was *non assumpsit,* and found for the plaintiff; and now moved in arrest of judgment, because it is for a consideration past; for it is in the preter tense *deliberasset,* and therefore no cause of action. And of that opinion was the whole court; wherefore judgment was stayed.[2]

RICHES and BRIGGS

In the Queen's Bench, Easter Term, 1601

[*Reported in Yelverton,* 4]

In an action on the case the plaintiff declared that, in consideration he had delivered to the defendant twenty quarters of wheat, the

[1] See also Pecke *v.* Redman, Dyer, 113 (1555).

[2] Barker *v.* Halifax, Cro. Eliz., 741; Docket *v.* Voyel, Cro. Eliz., 411, *acc.*

defendant promised upon request to deliver the same wheat again to the plaintiff. And adjudged a good consideration; for by POPHAM and *tot. cur* the very possession of the wheat might be a credit and good countenance to the defendant to be esteemed a rich farmer in the country, as in case of the delivery of 1,000*l.* in money to deliver again upon request; for by having so much money in his possession he may happen to be preferred in marriage. *Quære,* for it seems an hard judgment; for the defendant has not any manner of profit to receive, but only a bare possession. *Nota,* the truth of the case was (which doth not alter the reason *supra*) that the plaintiff had delivered to the defendant the said twenty quarters of wheat to deliver over to J. S. to whom the plaintiff was indebted in so many quarters, and the defendant promised to deliver the same quarters to J. S. And because they were not delivered, the plaintiff brought his action *ut supra;* and adjudged *ut supra.* But *nota,* the judgment was reversed in the Exchequer, Mich. 44 & 45 Eliz., as Hitcham told Yelverton.[1]

MAYLARD *v.* KESTER

IN THE KING'S BENCH, TRINITY TERM, 1601

[*Reported in Moore,* 711]

MAYLARD brings action on the case against Kester on assumpsit, in consideration that he would sell and deliver to Kester woollen cloth for the funeral of a clerk, Kester assumed to pay him *cum inde requisitus.* And alleges that he sold and delivered divers cloth to him at various prices, viz., thirty-one black striped garments for 19*l.*, and so he recites other lots in the same manner, and the sum amounted to 160*l.*, which he requested Kester to pay, and he did not pay according to the promise and assumption aforesaid. The defendant pleaded *non assumpsit,* and verdict was for the plaintiff, and judgment given. And on writ of error brought, the judgment was reversed in the Exchequer Chamber, Michaelmas Term, 41 & 42 Elizabeth, because debt properly lies, and not action on the case, the matter proving a perfect sale and contract.

SLADE'S CASE

IN THE KING'S BENCH, TRINITY TERM, 1602

[*Reported in* 4 *Coke,* 92*b*[2]]

JOHN SLADE brought an action on the case in the King's Bench against Humphrey Morley (which plea began Hil. 38 Eliz. Rot.

[1] Howlet *v.* Osborne, Cro. El., 380; Game *v.* Harvie, Yelv. 50; Pickas *v.* Guile, Yelv. 128, *acc.:* Wheatley *v.* Low, Cro. Jac. 668, *contra.* See 2 Harv. L. Rev. 5.

[2] Some authorities and illustrations are omitted.

305), and declared, that whereas the plaintiff, 10th of November, 36 Eliz. was possessed of a close of land in Halberton, in the county of Devon, called Rack Park, containing by estimation eight acres for the term of divers years then and yet to come, and being so possessed, the plaintiff the said 10th day of November, the said close had sowed with wheat and rye, which wheat and rye, 8 Maii, 37 Eliz. were grown into blades, the defendant, in consideration that the plaintiff, at the special instance and request of the said Humphrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close (the tithes due to the rector, &c. excepted), assumed and promised the plaintiff to pay him 16*l.* at the feast of St. John the Baptist then to come: and for non-payment thereof at the said feast of St. John Baptist, the plaintiff brought the said action: the defendant pleaded *non assumpsit modo et forma;* and on the trial of this issue the jurors gave a special verdict, *sc.*, that the defendant bought of the plaintiff the wheat and rye in blades growing upon the said close as is aforesaid, *prout* in the said declaration is alleged, and further found, that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain; and against the maintenance of this action divers objections were made by John Dodderidge of counsel with the defendant.

1. That the plaintiff upon this bargain might have ordinary remedy by action of debt, which is an action formed in the Register, and therefore he should not have an action on the case, which is an extraordinary action, and not limited within any certain form in the Register; for *ubi remedium ordinarium, ibi decurritur ad extraordinarium, et nunquam decurritur ad extraordinarium ubi valet ordinarium,* as appears by all our books; *et nullus debet agere actionem de dolo, ubi alia actia subest.* The second objection was, that the maintenance of this action takes away the defendant's benefit of wager of law, and so bereaves him of the benefit which the law gives him, which is his birthright. For peradventure the defendant has paid or satisfied the plaintiff in private betwixt them, of which payment or satisfaction he has no witness, and therefore it would be mischievous if he should not wage his law in such case. And that was the reason (as it was said) that debts by simple contract shall not be forfeited to the King by outlawry or attainder, because then by the King's prerogative the subject would be ousted of his wager of law, which is his birthright, as it is held in 40 E. 3. 5 a. 50 Ass. 1. 16 E. 4. 4 b. and 9 Eliz. Dyer 262. and if the King shall lose the forfeiture and the debt in such case, and the debtor by judgment of the law shall be rather discharged of his debt, before he shall be deprived of the benefit which the law gives him for his discharge, although in truth the debt was due and payable; *a fortiori* in the case at bar, the defendant shall not be charged in an action in which he shall be ousted of his law, when he may

charge him in an action, in which he may have the benefit of it: and as to these objections, the Courts of King's Bench and Common Pleas were divided; for the Justices of the King's Bench held, that the action (notwithstanding such objections) was maintainable, and the Court of Common Pleas held the contrary. And for the honor of the law, and for the quiet of the subject in the appeasing of such diversity of opinions (*quia nil in lege intolerabilius est eandem rem diverso jure censeri*) the case was openly argued before all the Justices of England, and Barons of the Exchequer, *sc.* Sir John Popham, Knt. C. J. of England, Sir Edm. Anderson, Knt. C. J. of the Common Pleas, Sir W. Periam, Chief Baron of the Exchequer, Clark, Gawdy, Walmesley, Fenner, Kingsmill, Savil, Warburton, and Yelverton, in the Exchequer Chamber, by the Queen's Attorney-General for the plaintiff, and by John Dodderidge for the defendant, and at another time the case was argued at Serjeants' Inn, before all the said Justices and Barons, by the Attorney-General for the plaintiff, and by Francis Bacon for the defendant, and after many conferences between the Justices and Barons, it was resolved, that the action was maintainable, and that the plaintiff should have judgment. And in this case these points were resolved: — 1. That although an action of debt lies upon the contract, yet the bargainor may have an action on the case, or an action of debt at his election, and that for three reasons or causes: 1. In respect of infinite precedents (which George Kemp, Esq., Secondary of the Prothonotaries of the King's Bench showed me), as well in the Court of Common Pleas as in the Court of King's Bench, in the reigns of King H. 6. E. 4. H. 7. and H. 8. by which it appears, that the plaintiffs declared that the defendants, in consideration of a sale to them of certain goods, promised to pay so much money, &c., in which cases the plaintiffs had judgment. . . . The second cause of their resolution was divers judgments and cases resolved in our books where such action on the case on Ass. has been maintainable, when the party might have had an action of debt, 21 H. 6. 55 b. 12 E. 4. 13. 13 H. 7. 26. 20 H. 7. 4 b. and 20 H. 7. 8 b. which case was adjudged as Fitz James cites it, 22 H. 8. Dyer 22 b. 27 H. 8. 24 & 25. in Tatam's case, Norwood and Read's case adjudged Plowd. Com. 180. 3. It was resolved, that every contract executory imports in itself an *assumpsit,* for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit,* for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in Read and Norwood's case, Pl. Com. 128. 4. It was resolved, that the plain-

tiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa,* a recovery or bar in an action of debt, is a good bar in an action on the case on *assumpsit. Vide* 12 E. 4. 13 a. 2 R. 3. 14. (32) 33 H. 8. *Action sur le case.* Br. 105. 5. In some cases it would be mischievous if an action of debt should be only brought, and not an action on the case, as in the case *inter* Redman and Peck, 2 & 3 Ph. and Mar. Dyer 113, they bargained together, that for a certain consideration Redman should deliver to Peck twenty quarters of barley yearly during his life, and for non-delivery in one year, it is adjudged that an action well lies, for otherwise it would be mischievous to Peck, for if he should be driven to his action of debt, then he himself could never have it, but his executors or administrators, for debt doth not lie in such case, till all the days are incurred, and that would be contrary to the bargain and intent of the parties, for Peck provides it yearly for his necessary use: so 5 Mar. Br. *Action sur le case* 108, that if a sum is given in marriage to be paid at several days, an action upon the case lies for non-payment at the first day, but no action of debt lies in such case till all the days are past. Also it is good in these days in as many cases as may be done by the law, to oust the defendant of his law, and to try it by the country, for otherwise it would be occasion of much perjury. 6. It was said, that an action on the case on *assumpsit* is as well a formed action, and contained in the register, as an action of debt, for there is its form: also it appears in divers other cases in the register, that an action on the case will lie, although the plaintiff may have another formed action in the Register. . . . And therefore it was concluded, that in all cases when the Register has two writs for one and the same case, it is in the party's election to take either. But the Register has two several actions, *sc.* action upon the case upon *assumpsit,* and also an action of debt, and therefore the party may elect either. And as to the objection which has been made, that it would be mischievous to the defendant that he should not wage his law, forasmuch as he might pay it in secret: to that it was answered, that it should be accounted his folly that he did not take sufficient witnesses with him to prove the payment he made: but the mischief would be rather on the other party, for now experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury: for *Jurare in propria causa* (as one saith) *est sæpenumero hoc seculo præcipitium diaboli ad detrudendas miserorum animas ad infernum:* and therefore in debt or other action where wager of law is admitted by the law, the Judges without good admonition and due examination of the party do not admit him to it. And as to the case which was cited,

that debts or duties due by single contract where the party may wage his law, shall not be forfeited by outlawry, because the debtor will be thereby ousted of his law: to that it was answered by the Attorney-General that in such case by the law, debts or duties shall be forfeited to the King, and so are the better opinions of the books.

RANN and Another, *Executors of* Mary Hughes, *v.* ISABELLA HUGHES, *Administratrix of* J. Hughes

In the House of Lords, May 14, 1778

[*Reported in* 7 *Term Reports,* 350, *note* (*a*)]

The declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendants' intestate should pay to the plaintiffs' testator 983*l.*; that the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid: by reason of which premises the defendant, as administratrix, became liable to pay to the plaintiffs, as executors, the said sum; and being so liable, she, in consideration thereof, undertook and promised to pay, &c. The defendant pleaded *non assumpsit, plene administravit,* and *plene administravit* except as to certain goods, &c., which were not sufficient to pay an outstanding bond-debt of the intestate's therein set forth, &c. The replication took issue on these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant *de bonis propriis.* This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where, after argument, the following question was proposed to the judges by the Lord Chancellor; Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity; upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect: It is undoubtedly true that every man is, by the law of nature, bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudem pactum, ex quo non oritur actio:* and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested;

and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise; but the promise must be coextensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that, if it were necessary to support the promise that it should be in writing, it will, after verdict, be presumed that it was in writing; and this last is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His Lordship observed, upon the doctrine of *nudum pactum* delivered by Mr. J. Wilmot in the case of Pillans *v.* Van Mierop and Hopkins, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case: the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and adminstrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case of Pillans *v.* Van Mieron, in Burr., and the case of Losh *v.* Williamson, Mich. 16 G. 3, in B. R.; and so far as these cases went on the doctrine of *nudum*

pactum, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.[1]

B. — General Principles

HAIGH and Another *v.* BROOKS

In the Queen's Bench, June 6, 1839

BROOKS *v.* HAIGH and Another

In the Exchequer Chamber, June 29, 1840

[*Reported in* 10 *Adolphus & Ellis,* 309, 323]

Assumpsit. The first count of the declaration stated that heretofore, to wit, on &c., in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guaranty of 10,000*l.*, on behalf of Messrs. John Lees & Sons, Manchester, then held by the said plaintiffs, he the said defendant undertook, and then faithfully promised the said plaintiffs, to see certain bills, accepted by the said Messrs. John Lees & Sons, paid at maturity; that is to say, a certain bill of exchange, bearing date, &c., drawn by plaintiffs upon and accepted by the said Lees & Sons, payable three months after date, for 3466*l.* 13*s.* 7*d.*, and made payable at, &c.; and also a certain other bill, &c., describing two other bills for 3000*l.* and 3200*l.*, drawn by plaintiffs upon and accepted by Lees & Sons, and made payable at, &c. Averment: that plaintiffs, relying on defendant's said promise, did then, to wit, on, &c., give up to the said defendant the said guaranty of 10,000*l.* Breach, non-payment of the bills, when they afterwards came to maturity, by Lees & Sons, or the parties at whose houses the bills respectively were made payable, or by defendant, or any other person, &c.

Third plea to the first count: "That the said supposed guaranty of 10,000*l.*, in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which guaranty was so given up to the said defendant as therein mentioned, was a special promise to answer the said plaintiffs for the debt and default of other persons, to wit, the said Messrs. John Lees & Sons in the said first count mentioned; and that no agreement in respect of, or relating to, the said supposed guaranty or

[1] In 7 Brown's Parliament Cases, 550 (vol. 4 of Tomlin's ed., p. 27) the arguments of counsel are given.

give it to me, I will pay you $1,000 in 30 days.

special promise, or any memorandum or note thereof, wherein any sufficient consideration for the said guaranty or special promise was stated or shown, was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guaranty was and is in the words and figures and to the effect following, that is to say: —

MANCHESTER, 4th February, 1837.

MESSRS. HAIGH & FRANCEYS.

GENT., — In consideration of your being in advance to Messrs. John Lees & Sons in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guaranty for that amount (say 10,000*l.*) on their behalf.

JOHN BROOKS.

And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guaranty or special promise; wherefore the said defendant says that the supposed guaranty, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and, therefore, that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect." Verification.

Demurrer: assigning for cause, "that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guaranty in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was, therefore, executed by the said plaintiffs; and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned." Joinder. The demurrer was argued in last Hilary Term.

Sir *W. W. Follett* for the plaintiffs.

Sir *J. Campbell,* Attorney-General, *contra.*

LORD DENMAN, C. J., in this Term (June 6th) delivered the judgment of the court.

It was argued for the defendant that this guaranty is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees's acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guaranty, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been "in consideration of your *becoming* in advance," or *"on condition* of your being in advance," such would have been the clear import.[1]

[1] See the discussion on the words "for giving his vote," in Lord Huntingtower *v.* Gardiner, 1 B. & C. 297.

As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guaranty; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so, the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guaranty could have been available within the doctrine of Wain *v.* Walters,[1] the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded: he may have had other objects and motives, and of their weight he was the only judge. We therefore think the plea bad; and the demurrer must prevail. *Judgment for the plaintiffs.*

The plaintiffs having signed judgment, error was brought in the Exchequer Chamber.

The writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were, that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in Trinity Vacation, June 22d, 1840, before Lord Abinger, C. B., Bosanquet, Coltman, and Maule, JJ., and Alderson and Rolfe, BB.

Sir *J. Campbell,* Attorney-General, for the plaintiff in error. . . .

Sir *W. W. Follett, contra.*

Lord Abinger, C. B., in the same Vacation (June 29th) delivered the judgment of the Court.

In the case of Brooks *v.* Haigh the judgment of the Court is to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guaranty an ambiguity that might be explained by evidence, so as to make it a valid contract; and therefore this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my

[1] 5 East, 10.

brother MAULE, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guaranty was written was given up; and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration without reference to its contents.

Judgment affirmed.[1]

SCHNELL *v.* NELL

INDIANA SUPREME COURT, NOVEMBER TERM, 1861

[*Reported in* 17 *Indiana,* 29]

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument: —

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion County, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks County, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following instalments, $200 in one year from the date

[1] A portion of the case is omitted.

"The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced." Blackburn, J., in Bolton *v.* Madden, L. R. 9 Q. B. 55. See also Wolford *v.* Powers, 85 Ind. 294; Colt *v.* McConnell, 116 Ind. 249; Mullen *v.* Hawkins, 141 Ind. 363; Train *v.* Gold, 5 Pick. 380, 384; Wilton *v.* Eaton, 127 Mass. 174; Whitney *v.* Clary, 145 Mass. 156; Daily *v.* Minnick, 91 N. W. Rep. 913 (Iowa); Willaims *v.* Jensen, 75 Mo. 681; Perkins *v.* Clay, 54 N. H. 518; Traphagen's Ex. *v.* Voorhees, 44 N. J. Eq. 21; Worth *v.* Case, 42 N. Y. 362; Earl *v.* Peck, 64 N. Y. 569; Cowee *v.* Cornell, 75 N. Y. 91; Judy *v.* Louderman, 48 Ohio St. 562; Cumming's Appeal, 67 Pa. 404; Giddings *v.* Giddings's Adm., 51 Vt. 227.

of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66⅔ each year, or as they may agree, till each one has received his full sum of $200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [one cent], and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, [SEAL.]
"J. B. NELL, [SEAL.]
"WEN. LORENZ." [SEAL.]

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c.

The will is copied into the record, but need not be into this opinion.

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p. 110.

The case turned below, and must turn here, upon the question whether the instument sued on does not express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.

3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker *v.* Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of

sums of money, of coin, whose value is exactly fixed,[1] but to the exchange of something of, in itself, indeterminate value, for money, or perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. Hardesty *v.* Smith, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. Spahr *v.* Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson *v.* Druley, 4 Ind. 519.

[1] Wolford *v.* Powers, 85 Ind. 294, 301; Shepard *v.* Rhodes, 7 R. I. 470, *acc.*

HARRISON *v.* CAGE AND HIS WIFE

IN THE KING'S BENCH, MICHAELMAS TERM, 1698

[*Reported in* 5 *Modern,* 411]

THIS is an action on the case, wherein the plaintiff declares that, in consideration the plaintiff would marry the defendant, the defendant promised to marry him, and that he had offered himself to her, but that she refused him, and had married the other defendant.

First. This action does not lie. Indeed it might be otherwise in the case of a woman; for a marriage is an advancement to a woman, but not to a man, as appears in Anne Davis's Case,[1] and in the case of a feoffment *causa matrimonii prætocuti,* which shows that there is a great difference between the two cases of a man and a woman; for it is a breach of a woman's modesty to promise a man to marry him, but it is not for a man to promise a woman to marry her.

Secondly. Here is no time laid when this marriage was to be; and it may be still.

Thirdly. The consideration is ill; it is no more than "I will be your husband if you will be my wife;" it is no more than this, "I will be your master, and you shall be my servant."

Fourthly. It is not reasonable that a young woman should be caught into a promise.

E contra. The action very well lies; and certainly marriage is as much advancement to a man as it is to a woman. And I am sorry that the counsel on the other side has so mean an opinion of a good woman as to think that she is no advancement to a man. We say that we have offered ourselves, and that she did refuse us; and though we do not mention the portion, it is well enough.

HOLT, C. J. Why should not a woman be bound by her promise as well as a man is bound by his? Either all is a *nudum pactum,* or else the one promise is as good as the other. You agree a woman shall have an action; now what is the consideration of a man's promise? Why, it is the woman's. Then why should not his promise be a good consideration for her promise, as well as her promise is a good consideration for his? There is the same parity of reason in the one case as there is in the other, and the consideration is mutual. As for the case of the *matrimonii prælocuti,* that goes upon another reason, there being a feoffment of lands and a condition annexed to it; but this here is upon a contract. In the ecclesiastical court he might have compelled a performance of this promise; but here, indeed, she has disabled herself, for she has married another. Then you might have given in evidence any lawful impediment upon this action; as that the parties were within the Levitical degrees, &c., for this makes the promise void; but it is otherwise of a precontract.

[1] 4 Rep. 16 *b*

Turton, J. There is as much reason for the one as for the other; and Halcomb's Case in Vaughan is plain.

Rokeby, J. If a man be scandalized by words *per quod matrimonium amisit,* a good action lies; and why not in this case?

Turton, J. This action is grounded on mutual promises.

Holt, C. J. The man is bound in respect of the woman's promise; if she make none, he is not bound by his promise, and then it is a *nudum pactum;* so that her promise must be good to make his signify anything to her; and then, if her promise be good, why should not a good action lie upon it? *Judgment for the plaintiff.*

HOLT *v.* WARD CLARENCIEUX

In the King's Bench, Trinity Term, 1732

[*Reported in* 2 *Strange,* 937]

The plaintiff declared that it was mutually agreed between the plaintiff and defendant that they should marry at a future day which is past, and that, in consideration of each other's promise, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of 4,000*l.*

The defendant, with leave of the Court, pleaded double; viz., *non assumpsit,* and that the plaintiff, at the time of the promise, was an infant of fifteen years of age.

The plaintiff joins issue on the *non assumpsit,* and a verdict is found for her, with 2,000*l.* damages. And, as to the plea of infancy, demurred.

This cause was several times argued at the bar: 1. By Mr. *Strange* for the plaintiff, and Serjeant *Chapple* for the defendant; when the Court inclined strongly with the plaintiff, because, though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, viz., by suit in the ecclesiastical court to compel a performance, the plaintiff being of the age of consent; and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

Upon the arguments of the civilians, no instance could be shown wherein they had compelled the performance of a minor's contract. And they who argued for the defendant strongly insisted that, in the case of a contract *per verba de futuro* (as this was), there was no remedy, even against a person of full age, in the spiritual court; but only an admonition. And the only reason why they hold jurisdiction in the case of a contract *per verba de præsenti* is because that is looked upon amongst them to be *ipsum matrimonium,* and

they only decree the formality of a solemnization in the face of the church.

After their arguments it was spoken to a fourth time by Mr. *Reeve* and Serjeant *Eyre*. And now this Term the Chief Justice delivered the resolution of the Court.

The objection in this case is, that, the plaintiff not being bound equally with the defendant, this is *nudum pactum,* and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians that, as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void. And we are all of opinion that this contract is not void, but only voidable at the election of the infant; and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age; and it is good or voidable at his election. Cro. Car. 502; 2 Rol. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Vent. 21; 1 Mod. 25; Sir W. Jones, 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

WILLIAM J. ATWELL *v.* EDWARD J. JENKINS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 24–April 2, 1895

[*Reported in* 163 *Massachusetts,* 362]

HOLMES, J. This is an action to recover four hundred dollars, put into the defendant's hands by the plaintiff through the Western Union Telegraph Company, under the following circumstances. One Hoes, an inhabitant of Chicago, committed an offence here and was arrested. It seems to have been for his interest to keep the matter private. He retained the defendant, who, on receipt of the above mentioned money, recognized as surety for him and obtained his release from arrest. Afterwards a *nolle prosequi* was entered by reason of the insanity of Hoes. When arrested Hoes telegraphed to the plaintiff, "Telegraph at once four hundred dollars to Hon. Edward J. Jenkins, my attorney. . . . Am in trouble. Don't fail." The plaintiff thereupon sent the money.

It hardly needs to be said that this transaction made no contract between the plaintiff and the defendant. The plaintiff's advance was to Hoes. When the money was received by Jenkins, it was received by Hoes as between them and the plaintiff, and if the defendant kept it, that was by some arrangement between him and Hoes with which the plaintiff had nothing to do.

But there was evidence that Hoes was insane at the time, and the plaintiff claims a right to recover on that ground. This must mean that he had a right to avoid his contract on the ground of the other party's insanity, and to demand his money wherever he could find it, unless the defendant, to whose hands it was traced, stood as a purchaser for value, or had changed his position, which fact the plaintiff had a right to deny, and did controvert in this case, except as to fifty or sixty dollars. We presume that the argument is, that if Hoes had become sane and had affirmed his dealings with the defendant, the plaintiff still would have had the right to prove that the defendant had no contract with Hoes, and was not a purchaser for value, and that, on the other hand, if Hoes had avoided his contract, his right to the money would be subject to the plaintiff's paramount right to the same fund, always supposing that the plaintiff had the right to avoid his contract also. Buller *v.* Harrison, Cowp. 565, 568; Cox *v.* Prentice, 3 M. & S. 344.

But the question is whether the plaintiff had the right supposed. In Holt *v.* Ward Clarencieux, Strange, 937, it was held, on great consideration, that a person of full age contracting with an infant was bound absolutely, although the infant had a right to avoid her contract. The decision was on demurrer to a plea of the plaintiff's infancy, not alleging that the defendant was ignorant of the fact when he made the contract, but seems to have been made without

regard to whether the defendant knew or not. This case is accepted without dispute as the law. Thompson *v.* Hamilton, 12 Pick. 425, 429; Warwick *v.* Bruce, 2 M. & S. 205; Bruce *v.* Warwick, 6 Taunt. 118; Monaghan *v.* Agricultural Ins. Co., 53 Mich. 238, 243; Hunt *v.* Peake, 5 Cowen, 475; Cannon *v.* Alsbury, 1 A. K. Marsh. 76; Johnson *v.* Rockwell, 12 Ind. 76, 81; Field *v.* Herrick, 101 Ill. 110; 2 Kent, Com. 78, 236; Leake, Con. (3d ed.) 476. The analogy between insane persons and infants is not perfect, but has prevailed in this matter. Allen *v.* Berryhill, 27 Iowa, 534; Harmon *v.* Harmon, 51 Fed. Rep. 113; Bish. Con. § 973; Clark, Con. 268. An insane person like Hoes, if he was insane, not a raving madman or an idiot, is capable of an act, even if his act be voidable. The promise of an insane man is not absolutely void. Carrier *v.* Sears, 4 Allen, 336, 337; Bullard *v.* Moor, 158 Mass. 418, 424. So that it cannot be argued that the contract was formally defective and void because only one party had done the necessary overt act. A voidable promise is a sufficient consideration. Plympton *v.* Dunn, 148 Mass. 523, 527. If a person unwittingly dealing with an insane man were given the right to avoid his contract when he found out the fact, it would be on grounds of policy and fairness, and of course it would be possible to read in a condition or personal exception to that effect. But there seems to be no more reason to do it in this case than when a man has contracted with an infant. The general rule is that a man takes the risk of facts which he deems material, unless he expressly stipulates for them in his contract, or unless he is misled by a fraudulent misrepresentation. See Ring *v.* Phœnix Assurance Co., 145 Mass. 426, 429. The right to avoid is for the personal protection of the insane, and those who deal with them have been held to have no corresponding rights in all the cases which we have seen. Upon these considerations, and in view of the decisions cited, we are of opinion that the plaintiff cannot repudiate his contract with Hoes. So long as that contract stands, at least, he cannot maintain an action against the defendant. Other defences need not be considered. We express no opinion as to the law in case of a bilateral contract wholly unexecuted on both sides.

Exceptions overruled.

ELEANOR THOMAS *v.* BENJAMIN THOMAS

In the Queen's Bench, February 5, 1842

[*Reported in* 2 *Queen's Bench Reports,* 851]

Assumpsit. The declaration stated an agreement between plaintiff and defendant that the defendant should, when thereto required by the plaintiff, by all necessary deeds, conveyances, assignments, or other assurances, grants, &c., or otherwise, assure a certain dwelling-house and premises, in the county of Glamorgan, unto plaintiff

for her life, or so long as she should continue a widow and unmarried; and that plaintiff should, at all times during which she should have possession of the said dwelling-house and premises, pay to defendant and one Samuel Thomas (since deceased), their executors, administrators, or assigns, the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and keep the said dwelling-house and premises in good and tenantable repair. That the said agreement being made, in consideration thereof and of plaintiff's promise to perform the agreement, Samuel Thomas and the defendant promised to perform the same; and that although plaintiff afterwards and before the commencement of the suit, to wit, &c., required of defendant to grant, &c., by a necessary and sufficient deed, &c., the said dwelling-house, &c., to plaintiff for her life, or whilst she continued a widow; and though she had then continued, &c., and still was, a widow and unmarried, and although she did, to wit, on, &c., tender to the defendant for his execution a certain necessary and sufficient deed, &c., proper and sufficient for the conveyance, &c., and although, &c. (general readiness of plaintiff to perform), yet defendant did not nor would then or at any other time convey, &c.

Pleas: 1. Non assumpsit. 2. That there was not the consideration alleged in the declaration for the defendant's promise. 3. Fraud and covin. Issues thereon.

At the trial before Coltman, J., at the Glamorganshire Lent Assizes, 1841, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling-houses in Methyr Tidvil, in one of which, being the dwelling-house in question, he was himself residing; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of al his houses, &c., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of 100*l.* instead thereof.

This declaration being shortly afterwards brought to the knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect; and after the lapse of a few days they and the plaintiff executed the agreement declared upon, which, after stating the parties and briefly reciting the will, proceeded as follows: —

"And whereas the said testator, shortly before his death, declared,

in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling-house," &c., "or 100*l.* out of his personal estate," in addition to the respective legacies and bequests given her in and by his said will; "but such declaration and desire was not reduced to writing in the life-time of the said John Thomas and read over to him; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect: Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises," the executors would convey the dwelling-house, &c., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried: "provided nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas or her assigns shall and will, at all times during which she shall have possession of the said dwelling-house, &c., pay to the said Samuel Thomas and Benjamin Thomas, their executors, &c., the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and shall and will keep the said dwelling-house and premises in good and tenantable repair:" with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling-house and premises for some time; but the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and shortly before the trial brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned judge overruled the objection, reserving leave to move to enter a nonsuit. Ultimately a verdict was found for the plaintiff on all the issues; and in Easter Term last a rule *nisi* was obtained pursuant to the leave reserved.

Chilton and *W. M. James* now showed cause.

E. V. Williams, contra.

Lord Denman, C. J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground-rent was payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso.) This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large: the word *causa* in the passage referred to means

one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant: it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff, or some benefit to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here — a pious respect for the wishes of the testator — does not in any way move from the plaintiff: it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift: but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground-rent, and which is made payable not to a superior landlord but to the executors. So that this rent is clearly not something incident to the assignment of the house; for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs: these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it: for any thing that appears, the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value: possibly that might be so: but suppose it would: the plaintiff contracts to take it, and does take it, whatever it is, for better for worse: perhaps a *bonâ fide* purchase for a valuable consideration might override it; but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the argument have in fact disposed of the case. It is conceded that mere motive need not be stated; and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part: *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator; but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it

could hardly have been argued that the declaration was not well drawn, and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of 1*l.* annually is more than a good consideration: it is a valuable consideration: it is clearly a thing newly created, and not part of the old ground-rent. *Rule discharged.*[1]

WILLIAM McMULLAN *v.* DICKINSON COMPANY

MINNESOTA SUPREME COURT, January 14, 1896

[*Reported in* 63 *Minnesota,* 405]

COLLINS, J.[2] From the resolution which was incorporated bodily into the instrument executed by both parties as their contract it appears that it was resolved to employ plaintiff as an assistant manager of the corporate business at a fixed salary per year, payable in monthly instalments. The term of employoment was determined upon as the period of time during which the corporate business might be carried on; not to exceed, of course, the life of the corporation as fixed by law. Two provisos were appended to the paragraph relating to the term of employment, — one that plaintiff should properly and efficiently discharge his duties as such assistant; the other, that his term of employment should continue only so long as he owned and held, in his own name, fifty shares, fully paid up, of the defendant's capital stock. A recital that plaintiff had accepted the employment followed, and then the agreement whereby defendant employed plaintiff and the latter entered into the employment, each party being subject to the terms and conditions mentioned and prescribed by the resolution.

Counsel for defendant urges several objections to the validity of the contract, but they are all disposed of by considering the claim that it is and was void for lack of mutuality of consideration, the point being that, while the character of the services to be rendered and the compensation were fixed, no definite period of time was agreed upon during which the plaintiff should work or defendant employ and pay. The language used, independent of the provisos, was: "Said employment is to continue during the time the business of said corporation shall be continued, not exceeding the term and existence of the corporation." The only conditions mentioned and imposed being that, while in defendant's employ, the plaintiff should render proper and efficient service, and should own and hold in his own name certain shares of corporate stock.

As we construe the expressions used, the duration of the term of

[1] Montpelier Seminary *v.* Smith's Estate, 69 Vt. 382, *contra.*

[2] Part of the case is omitted.

employment was sufficiently defined, for the law does not require that the precise number of days or months or years shall be stated; and there was mutuality of consideration. The term fixed, dependent only upon the condition as to plaintiff's ownership of the stock shares, was for such period of time as defendant corporation might continue to transact business. It might cease to do business voluntarily, or there might be an involuntary termination of its business transactions; for instance by proceedings in insolvency instituted by its creditors, or the business might terminate by operation of law at the end of not to exceed thirty years from the date of its organization, — that being the life term of corporations of this character under the statutes. The defendant agreed to keep plaintiff in its employ so long as he retained as the owner, and held in his own name, the shares, and it continued in business; and plaintiff, in consideration of defendant's agreement, stipulated that, so long as he remained in such employment, he would own and hold the stock, and would perform proper and efficient service. The requirement that plaintiff should own and continue to hold the stock as a condition to his retention by defendant was, presumptively, for the benefit of the latter, and a detriment to the former. It was in defendant's interest to have its stock shares permanently held by its employés, for such holding would serve to stimulate them in the performance of their duties. It was an injury to plaintiff to hold the stock as a condition for his employment, especially when we consider that the business of the concern could be closed out at any time, leaving him out of employment, with the stock upon his hands. Had the plaintiff disposed of his shares, the defendant would have suffered a loss; and, had the latter ceased business, the former would have been injured. Had the relation of employer and employé terminated between these parties through the happening of either of these two contingencies, neither party would have been in *statu quo*. The consideration for the agreement was ample and mutual, although the term of service might be terminated by defendant's cessation of business or plaintiff's selling his stock in the corporation. See Bolles *v.* Sachs, 37 Minn. 315, 33 N. W. 862. The expressions of a contingency whereby the contract might be terminated by the act of either party expressly excluded the idea that each was at liberty to terminate it at any time without regard to the happening of either contingency.[1]

[1] "When a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration." HOLMES, J., in Gutlon *v.* Marcus, 165 Mass. 335, 336.

MARGARET WELLS, Appellant, *v.* FRANCIS ALEXANDRE, et al., Respondent

New York Court of Appeals, October 13–December 1, 1891

[*Reported in* 130 *New York,* 642]

Parker, J.[1] December 31, 1887, the plaintiff addressed the following communication to the defendants: —

"Messrs. F. Alexandre & Sons, New York:

"Gents, — We propose to furnish your steamers, 'City of Alexandria,' 'City of Washington' and 'Manhattan,' with strictly free burning pea, delivered alongside Pier 3, North River, for the year 1888, commencing Jan. 1st to Dec. 31st, for the sum of three dollars and five cents per ton. We also agree to furnish any other steamers of your line with same coal and at same price at any time you wish. If, through any cause, we are unable to deliver pea coal, we will deliver you other sizes at an equitable adjustment of price.

"Yours, very respectfully,

"Jos. K. Wells, *Agt.*"

To which the defendants on January 4, 1888, replied as follows: —

"Mr. Jos. K. Wells:

"Dear Sir, — We beg to accept your offer of 31st ult., to furnish our steamers, 'City of Alexandria' 'City of Washington' and 'Manhattan,' with strictly free burning pea coal, delivered along side Pier 3, North River, for the year 1888, commencing January 1st, for the sum of $3.05 per ton of 2,240 lbs.; also to furnish any other steamer of our line with same coal at same price, if we wish it. If, through any cause, you are unable to deliver pea coal, you will deliver us other sizes at an equitable adjustment of price.

"Yours truly,

"F. Alexandre & Sons."

Thereafter, and until the twenty-fifth day of June following, the plaintiff furnished to the defendants such quantities of coal as were required for the use of the steamships named. On that day the defendants sold to the New York and Cuba Steamship Company all their steamship property, charters, and business, including the steamers mentioned in the correspondence, and ceased to operate them. The steamers under the control and management of the purchaser of June twenty-fifth continued to make regular trips at stated intervals between the same ports as before, and during the remaining portion of the year required and used large quantities of coal. The plaintiff insists that the correspondence created a valid contract by which she became bound to deliver, and the defendants to receive, at the price named, all coal which would be required for the operation of the steamers during 1888, and as the coal required for their use was not received by the defendants after June twenty-fifth, that she is entitled to recover the damages sustained because of the default of the defendants.

The defendants, on the other hand, contend that the correspondence did not created a contract; that if it did, it was a contract for successive deliveries of coal, to be made only when the defendants

[1] A small portion of the opinion is omitted.

should give the plaintiff notice that a delivery was required, and as notice had not been given, the defendants are not in default.

If in plaintiff's offer the words "one thousand tons" had been employed instead of "your steamers 'City of Alexandria,' 'City of Washington' and 'Manhattan,'" it would not be questioned that the written acceptance of the defendants created a valid contract. The offer and acceptance were unqualified; the price fixed; the duration of the contract limited to a period commencing January first, and ending December thirty-first of the same year; and the quantity would have been certain.

As it was not possible to determine the precise amount of coal that would be required to operate the steamers during the year, the plaintiff seems to have made his proposition as to amount as definite and certain as the situation permitted. Three of defendants' steamers made regular trips at stated intervals between certain ports and necessarily required and used in so doing large quantities of coal, and in view of that condition the plaintiff offered to "furnish your steamers 'City of Alexandria,' 'City of Washington' and 'Manhattan,'" with coal for a period of about a year. It is very clear that the language employed by plaintiff in the light of surrounding circumstances was intended to make as definite as possible the quantity of coal which the defendants would be required to take. The quantity to be measured by the requirements of the three steamers for the year ensuing in an employment about which they had been long engaged. So, while at the date of the agreement the quantity was indefinite, it was, nevertheless, determinable by its terms and, therefore, certain, within the maxim, *certum est quod certum reddi-potest.*

Defendants urged that if it be conceded that the proposition accepted was to furnish the steamers with coal for the year, at three dollars and five cents per ton, still the undertaking was to furnish coal from time to time when defendants should notify her that deliveries were required, and as no such notice has been given since the last delivery for which payment has been made, the defendants are not in default and no recovery can be had.

The argument made in support of this proposition briefly stated is, that it is apparent that it could not have been in the contemplation of the parties that the coal should be furnished in one lot, but rather at different times as the steamers required it for their several voyages; nor could the plaintiff know the amount which each steamer would require at the successive loadings. Therefore, the defendants were to determine the time and quantity for each delivery, and as the contract contained no promise to give the plaintiff notice, the defendants were bound to take only such coal as they notified the plaintiff to furnish.

It may be doubted whether there is any thing in the record to warrant a determination that the plaintiff would not know the several

amounts and times when coal would be needed, but if it were otherwise, we do not deem it controlling. As we have already said, the evident intention of the parties was that the plaintiff should furnish to the defendants all the coal which the steamers named should require in the work in which they were employed for the year ensuing, and that the parties should perform all needful acts to give effect to the agreement; therefore, if a notice was requisite to its proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable and place one of the parties entirely at the mercy of the other. Jugla *v.* Trouttet, 120 N. Y. 21–28; New Eng. Iron Co. *v.* Gilbert E. R. R. Co., 91 id. 153; Booth *v.* C. R. M. Co., 74 id. 15.

The fact that the defendants deemed it best to sell the steamers, cannot be permitted to operate to relieve them from the obligation to take the coal which the ordinary and accustomed use of the steamers required, for the provisions of the agreement do not admit of a construction that it was to terminate in the event of a sale or other disposition of them by the defendants.

The judgment should be reversed.

BALFOUR *v.* BALFOUR

IN THE COURT OF APPEAL — July 24, 25, 1919

[*Reported in* [1919] 2 *King's Bench,* 571]

THE plaintiff sued the defendant (her husband) for money which she claimed to be due in respect of an agreed allowance of 30*l.* a month. The alleged agreement was entered into under the following circumstances. The parties were married in August, 1900. The husband, a civil engineer, had a post under the Government of Ceylon as Director of Irrigation, and after the marriage he and his wife went to Ceylon, and lived there together until the year 1915, except that in 1906 they paid a short visit to this country, and in 1908 the wife came to England in order to undergo an operation, after which she returned to Ceylon. In November, 1915, she came to this country with her husband, who was on leave. They remained in England until August, 1916, when the husband's leave was up and he had to return. The wife, however, on the doctor's advice remained in England. On August 8, 1916, the husband being about to sail, the alleged parol agreement sued upon was made. The plaintiff, as appeared from the judge's note, gave the following evidence of what took place: "In August, 1916, defendant's leave was up. I was suffering from rheumatic arthritis. The doctor advised my staying in England for some months, not to go out till November 4. On August 8 my husband sailed. He gave me a cheque from 8th to 31st for 24*l.*, and promised to give me 30*l.* per month till

I returned." Later on she said: "My husband and I wrote the figures together on August 8; 34*l.* shown. Afterwards he said 30*l.*" In cross-examination she said that they had not agreed to live apart until subsequent differences arose between them, and that the agreement of August, 1916, was one which might be made by a couple in amity. Her husband in consultation with her assessed her needs, and said he would send 30*l.* per month for her maintenance. She further said that she then understood that the defendant would be returning to England in a few months, but that he afterwards wrote to her suggesting that they had better remain apart. In March, 1918, she commenced proceedings for restitution of conjugal rights, and on July 30 she obtained a decree nisi. On December 16, 1918, she obtained an order for alimony.

SARGANT, J., held that the husband was under an obligation to support his wife, and the parties had contracted that the extent of that obligation should be defined in terms of so much a month. The consent of the wife to that arrangement was a sufficient consideration to constitute a contract which could be sued upon.

He accordingly gave judgment for the plaintiff.

The husband appealed.

WARRINGTON, L. J. (after stating the facts). Those being the facts we have to say whether there is a legal contract between the parties, in other words, whether what took place between them was in the domain of a contract or whether it was merely a domestic arrangement such as may be made every day between a husband and wife who are living together in friendly intercourse. It may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case to be made between husband and wife. The question is whether such a contract was made. That can only be determined either by proving that it was made in express terms, or that there is a necessary implication from the circumstances of the parties, and the transaction generally, that such a contract was made. It is quite plain that no such contract was made in express terms, and there was no bargain on the part of the wife at all. All that took place was this: The husband and wife met in a friendly way and discussed what would be necessary for her support while she was detained in England, the husband being in Ceylon, and they came to the conclusion that 30*l.* a month would be about right, but there is no evidence of any express bargain by the wife that she would in all the circumstances treat that as in satisfaction of the obligation of the husband to maintain her. Can we find a contract from the position of the parties? It seems to me it is quite impossible. If we were to imply such a contract in this case we should be implying on the part of the wife that whatever happened and whatever might be the change of circumstances while the husband was away she should be content with this 30*l.* a month, and bind herself by an obligation in law not to re-

quire him to pay anything more; and on the other hand we should be implying on the part of the husband a bargain to pay 30*l.* a month for some indefinite period whatever might be his circumstances. Then again it seems to me that it would be impossible to make any such implication. The matter really reduces itself to an absurdity when one considers it, because if we were to hold that there was a contract in this case we should have to hold that with regard to all the more or less trivial concerns of life where a wife, at the request of her husband, makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make it, and was bound in honour to continue it so long as he was in a position to do so. The wife, on the other hand, so far as I can see, made no bargain at all. That is in my opinion sufficient to dispose of the case.

It is unnecessary to consider whether if the husband failed to make the payments the wife could pledge his credit or whether if he failed to make the payments she could have made some other arrangements. The only question we have to consider is whether the wife has made out a contract which she has set out to do. In my opinion she has not.

I think the judgment of Sargant J. cannot stand, the appeal ought to be allowed and judgment ought to be entered for the defendant.[1]

JOHN SEMMES DEVECMON *v.* ALEXANDER SHAW AND CHRISTIAN DEVRIES, Executors of John S. Combs

Maryland Court of Appeals, April Term, 1888

[*Reported in* 69 *Maryland,* 199]

Bryan, J., delivered the opinion of the court: —

John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in the common counts, and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "that the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff at the instance and request of said Combs,

[1] Duke, L. J. and Atkin, L. J. delivered concurring opinions.

and upon a promise from him that he would reimburse and repay to the plaintiff all money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present; or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretence.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in *indebitatus assumpsit;* and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants' testator in his lifetime, at his request." In the bill of particulars, we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted:

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars, marked, 'Exhibit No. 1, Bill of Particulars.'"

The only evidence bearing on this question is the account taken

from the books of the deceased, which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.

KIRKSEY *v.* KIRKSEY

ALABAMA SUPREME COURT, JANUARY TERM, 1845

[*Reported in* 8 *Alabama,* 131]

ERROR to the Circuit Court of Talladega.

Assumpsit by the defendant, against the plaintiff in error. The question is presented in this Court, upon a case agreed, which shows the following facts: —

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega County, some sixty or seventy miles off. On the 10th October, 1840, he wrote to her the following letter: —

"DEAR SISTER ANTILLICO, — Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. . . . I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for two hundred dollars, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. The inclination of my mind is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers,

however, think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach. The judgment of the Court below must therefore be reversed, pursuant to the agreement of the parties.[1]

PRESBYTERIAN CHURCH OF ALBANY, APPELLANT, *v.* THOMAS C. COOPER ET AL. AS ADMINISTRATORS, ETC., RESPONDENTS

NEW YORK COURT OF APPEALS, January 25–March 5, 1889

[*Reported in* 112 *New York,* 517]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made the first Tuesday of May, 1887, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and ordered a new trial. (Reported below, 45 Hun, 453.)

This was a reference under the statute of a disputed claim against the estate of Thomas P. Crook, defendants' intestate. The claim arose under a subscription paper, of which the following is a copy: —

"We, the undersigned, hereby severally promise and agree to and with the trustees of the First Presbyterian Church in this city of Albany, in consideration of one dollar to each of us in hand paid and the agreements of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names, but upon the express condition, and not otherwise, that the sum of $45,000 in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of $45,000, now a lien upon the church edifice of said church, and the subscription or contribution for that purpose

[1] The decision was followed in Forward *v.* Armstead, 12 Ala. 124; Bibb. *v.* Freeman, 59 Ala. 612. In the latter case the Court said: "It is often a matter of great difficulty to discern the line which separates promises creating legal obligations from mere gratuitous agreements. Each case depends so much on its own peculiar facts and circumstances that it affords but little aid in determining other cases of differing facts. The promise or agreement, the relation of the parties, the circumstances surrounding them, and their intent, as it may be deduced from these, must determine the inquiry. If the purpose is to confer on the promisee a benefit from affection and generosity, the agreement is gratuitous. If the purpose is to obtain a *quid pro quo* — if there is something to be received, in exchange for which the promise is given, the promise is not gratuitous, but of legal obligation."

See also in accord, Boord *v.* Boord, Pelham (So. Aust.), 58. But see *contra*, Shirley *v.* Harris, 3 McLean, 330; Berry *v.* Graddy, 1 Met. (Ky.) 553; Bigelow *v.* Bigelow, 95 Me. 17; Steele *v.* Steele, 75 Md. 477; Adams *v.* Honness, 62 Barb. 326; Richardson *v.* Gosser, 26 Pa. 335.

In regard to the enforcement of promises relating to land, unenforceable at law, by courts of equity in order to prevent a fraud, see Pomeroy on Eq. Jur. § 1294; Ames, Cas. on Eq. Jur. 306–309.

must equal that sum in the aggregate to make this agreement binding.

"Dated May 18, 1884."

The defendants' intestate made two subscriptions to this paper, — one of $5,000 and another of $500. He paid upon the subscription $2,000. The claim was for the balance.

Matthew Hale, for appellant.

Walter E. Ward, for respondent.

ANDREWS, J. It is, we think, an inseparable objection to the maintenance of this action that there was no valid consideration to uphold the subscription of the defendants' intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations or may not be justified in the forum of conscience. By the terms of the subscription paper the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees, within three years from its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage-debt of $45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz, "in consideration of one dollar to each of us (subscribers) in hand paid and the agreement of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration which, on its face, is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the Chancellor as expressed in Hamilton College *v.* Stewart when it was before the Court of Errors (2 Den. 417), and *dicta* of judges will be found to the same effect in other cases. Trustees, etc., *v.* Stetson, 5 Pick. 508; Watkins *v.* Eames, 9 Cush. 537. But the doctrine of the Chancellor, as we understand, was overruled when the Hamilton College case came before this court, 1 N. Y. 581, as have been also the

dicta in the Massachusetts cases, by the court in that State, in the recent case of Cottage Street Methodist Episcopal Church *v.* Kendall, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.

In the disposition of this case we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendants' intestate, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfil the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees, did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property, upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in Hamilton College *v.* Stewart, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that

it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of defendants' intestate. We are unable to distinguish this case in principle from Hamilton College *v.* Stewart, 1 N. Y. 581. There is nothing that can be urged to sustain this subscription that could not, with equal force, have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College case (which in that respect is unlike the present one) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown, also, that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, but has been frequently cited with approval in the courts of this and other States. The cases of Barnes *v.* Perine, 12 N. Y. 18, and Roberts *v.* Cobb, 103 id. 600, are not in conflict with that decision. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisee. Judge Allen, in his opinion in Barnes *v.* Perine, said: "The request and promise were, to every legal effect, simultaneous," and he expressly disclaims any intention to interfere with the decision in the Hamilton College case. In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in

which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we have reached. But we think there is no alternative, and that the order should be affirmed.

All concur. *Order affirmed and judgment accordingly.*[1]

AUGUSTUS B. MARTIN and Others *v.* WILLIAM MELES and Others

Supreme Judicial Court of Massachusetts, March 20–May 23, 1901

[*Reported in* 179 *Massachusetts,* 114]

Holmes, C. J. This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others: "January 21, 1896, We, the undersigned, manufacturers of leather, promise to contribute the sum of five hundred (500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses under the direction of the committee, in defending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us the committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

[1] Charitable subscriptions have been held supported by sufficient consideration on various grounds: —

1. If the work for which the subscription was made has been done, or liability incurred in regard to such work, on the faith of the subscription, consideration is found in that fact. Young Men's Christian Assoc. *v.* Estill, 140 Ga. 291; Trustees *v.* Garvey, 53 Ill. 401; Des Moines Univ. *v.* Livingston, 57 Ia. 307, 65 Ia. 202; First Church *v.* Donnell, 110 Ia. 5; Brokaw *v.* McElroy 162 Ia. 288; Gittings *v.* Mayhew, 6 Md. 113; Cottage St. Church *v.* Kendall, 121 Mass. 528; Robinson *v.* Nutt, 185 Mass. 345; Albert Lea College *v.* Brown, 88 Minn. 524; Pitt *v.* Gentle, 49 Mo. 74; Irwin *v.* Lombard University, 56 Ohio St. 9. (Compare Johnson *v.* Otterbein University, 41 Ohio St. 527); *in re* Converse's Est. 240 Pa. 458; Hodges *v.* Nalty, 104 Wis. 464. See also Lasar *v.* Johnson, 125 Cal. 549; Galt's Ex. *v.* Swain, 9 Gratt, 633.

In Beatty *v.* Western College, 177 Ill. 280, the Court enforced the promise, because liabilities had been incurred, but said (p. 292), "The gift will be enforced upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking.

By the reasoning of these cases a subscription is treated as an offer. Therefore until work has been done or liability incurred the subscription may be revoked by death, insanity, or otherwise. Grand Lodge *v.* Farnham, 70 Cal. 158; Pratt *v.* Baptist Soc., 93 Ill. 475; Beach *v.* First Church, 96 Ill. 177; Helfenstein's Est., 77 Pa. 328; First Church *v.* Gillis, 17 Pa. Co. Ct. 614. See also *Reimensnyder v.* Gans, 110 Pa. 17.

2. It is held in other jurisdictions that the promise of each subscriber is supported by the promises of the others. Christian College *v.* Hendley, 49 Cal. 347; Higert *v.* Trustees, 53 Ind. 326; Petty *v.* Trustees, 95 Ind. 278; Allen *v.* Duffie, 43 Mich. 1;

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants, who were not members. They went on with their work, undertook the defence of suits, and levied assessments which were paid, the defendants having paid $750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription, refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

If then the committee's promise should be regarded as the consideration, as in Ladies' Collegiate Institute *v.* French, 16 Gray, 196, 201 (see Maine Central Institute *v.* Haskell, 75 Maine, 140,

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Congregational Soc. *v.* Perry, 6 N. H. 164; Edinboro Academy *v.* Robinson, 37 Pa. 210. See also First Church *v.* Pungs, 126 Mich. 670; Homan *v.* Steele, 18 Neb. 652.

3. It has been held that the acceptance of the subscription by the beneficiary or its representatives imports a promise to apply the funds properly, and this promise supports the subscribers' promises. Barnett *v.* Franklin College, 10 Ind. App. 103; Collier *v.* Baptist Soc., 8 B. Mon. 68; Trustees *v.* Fleming, 10 Bush, 234; Trustees *v.* Haskell, 73 Me. 140; Helfenstein's Est., 77 Pa. 328, 331; Trustees *v.* Nelson 24 Vt. 189.

4. The fact that other subscriptions have been induced has been held in some cases a good consideration. Hanson Trustees *v.* Stetson 5 Pick. 506; Watkins *v.* Eames, 9 Cuch. 537; Ives *v.* Sterling, 6 Met. 310 (but this theory was discredited in Cottage St. Church *v.* Kendall, 121 Mass. 528); Comstock *v.* Howd, 15 Mich. 237 (but see Northern, &c. R. R. *v.* Eslow, 40 Mich. 222); Irwin *v.* Lombard University, 56 Ohio St. 9.

In England a charitable subscription is not binding. *Re* Hudson, 54 L. J. Ch. 811. See also Culver *v.* Banning, 19 Minn. 303; Twenty-third St. Church *v.* Cornell, 117 N. Y. 601 (compare Keuka College *v.* Ray, 167 N. Y. 96); Montpelier Seminary *v.* Smith's Estate, 69 Vt. 382 (compare Grand Isle *v.* Kinney, 70 Vt. 381).

In *in re* Hudson, Pearson, J., said: "If A. says, 'I will give you, B., 1000*l.*,' and B., in reliance on that promise, spends 1000*l.* in buying a house, B. cannot recover the 1000*l.* from A."

In a few cases of charitable subscriptions the special facts show that the promise was made for clearly good consideration. Rogers *v.* Galloway College, 64 Ark. 627; Lasar *v.* Johnson, 125 Cal. 549; La Fayette Corporation *v.* Ryland, 80 Wis. 29.

144), its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustees to apply the funds received for a mere benevolence to the purposes of the trust imposes no new burden upon them. Johnson *v.* Otterbein University, 41 Ohio St. 527, 531. See Presbyterian Church of Albany *v.* Cooper, 112 N. Y. 517. Neither would it raise the question whether the promise to receive a gift was a consideration for a promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. Cottage Street Church *v.* Kendall, 121 Mass. 528; Sherwin *v.* Fletcher, 168 Mass. 413. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. Bragg *v.* Danielson, 141 Mass. 195, 196. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive, and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. Sherwin *v.* Fletcher, *ubi supra.*

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the committee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration (Williams *v.* Carwardine, 4 B. & Ad. 621; see Maine Central Institute *v.* Haskell, 75 Maine, 140, 145), or of fraud. Windram *v.* French, 151 Mass. 547, 553. In Cottage Street Church *v.* Kendall, 121 Mass. 528, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether

the facts were such that reliance upon the promise would be presumed. In Bridgewater Academy *v.* Gilbert, 2 Pick. 579, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See Amherst Academy *v.* Cowls, 6 Pick. 427, 438; Ives *v.* Sterling, 6 Met. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it seems to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the Court to leave things where it found them. *In re* Hudson, 54 L. J. Ch. 811; Presbyterian Church of Albany *v.* Cooper, 112 N. Y. 517. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See Amherst Academy *v.* Cowls, 6 Pick. 427, 438. But if that were true, it would follow that as to the future conduct of the committee their promise, not their performance, was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definitive decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay.

What has been said pretty nearly disposes of a subordinate point raised by the defendants. It is argued that, by notice pending performance that they would not go on with the contract, the defendants, even if they incurred a liability to damages, put an end to the right of the plaintiffs to go on and to recover further assessments, as in the case where an order for work is countermanded at the moment when performance is about to begin under the contract (Davis *v.* Bronson, 2 No. Dak. 300), or when at a later moment the plaintiff was directed to stop (Clark *v.* Marsiglia, 1 Den. 317), followed by many later cases in this country. See Collins *v.* Delaporte, 115 Mass. 159, 162. We assume that these decisions are right in cases where the continuance of work by the plaintiff would be merely a useless enhancement of damages. But we are of opinion that they do not apply. In the first place it does not appear that such a notice was given. The first definite notice and the first breach was a refusal to pay on demand. At that time the liability was fixed, and the damages were the sum demanded.

In the next place, if a definite notice had been given by the defendants in advance that they would not pay, whatever rights it might have given the plaintiffs at their election (Ballou *v.* Billings, 136 Mass. 307), it would not have been a breach of the contract (Daniels *v.* Newton, 114 Mass. 530), and it would not have ended the right of the plaintiffs to go on under the contract in a case like the present, where there was a common interest in the performance, and where what had been done and what remained to do probably were to a large extent interdependent. Davis *v.* Campbell, 93 Ia. 524; Gibbons *v.* Bente, 51 Minn. 499; Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6. See Frost *v.* Knight, L. R. 7 Ex. 111, 112; Johnstone *v.* Milling, 16 Q. B. D. 460, 470, 473; Dalrymple *v.* Scott, 19 Ont. App. 477; John A. Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 660, 666; Davis *v.* Bronson, 2 No. Dak. 300, 303.

Before leaving the case it is interesting to remark that the notion rightly exploded in Cottage Street Church *v.* Kendall, 121 Mass. 528, 530, 531, that the subscription of others than the plaintiff may be a consideration, seems to have remained unquestioned with regard to agreements of creditors to accept a composition. Compare the remarks of Wells, J., in Perkins *v.* Lockwood, 100 Mass. 249, 250 (Farrington *v.* Hodgdon, 119 Mass. 453, 457; Trecy *v.* Jefts, 149 Mass, 211, 212; Emerson *v.* Gerber, 178 Mass, 130), with what he says in Athol Music Hall Co. *v.* Corey, 116 Mass. 471, 474.

It is not argued that whatever contract was made was not made with the plaintiffs. Sherwin *v.* Fletcher, 168 Mass. 413.

Demurrer overruled; exceptions overruled.[1]

HORACE S. WARREN *v.* AMASA S. HODGE

Supreme Judicial Court of Massachusetts, October 4, 1876

[*Reported in* 121 *Massachusetts,* 106]

Contract to recover $184 for work and labor. Writ dated April 12, 1875.

At the trial in the Superior Court, before Putnam, J., the defendant contended that the action was prematurely brought, and introduced evidence that, on or about March 17, 1875, being about two months after the plaintiff had left his employ, and after the

[1] Instances of subscriptions for business purposes are Richelieu Hotel Co. *v.* International Co., 140 Ill. 248; Fort Wayne Co. *v.* Miller, 131 Ind. 499; Bryant's Pond Co *v.* Felt, 87 Me. 234; Hudson Co. *v.* Tower, 156 Mass. 82, 161 Mass. 10; Bohn Mfg. Co. *v.* Lewis, 45 Minn. 164; Gibbons *v.* Bente, 51 Minn. 500; Homan *v.* Steele, 18 Neb 652; Locke *v.* Taylor 161 N. Y. App. D. 44; Auburn Works *v.* Shultz, 143 Pa. 256; Gerard *v.* Seattle, 73 Wash. 519; Gibbons *v.* Grinsel, 79 Wis. 365; Superior Land Co. *v.* Bickford, 93 Wis. 220; Badger Paper Co. *v.* Rose, 95 Wis. 145.

time when the amount was due, the plaintiff called at his office and demanded the amount due him, and said that, if the defendant would give him $25 on account, he would wait until May 1 for the balance, and he thereupon paid him $25 on account, and the plaintiff then agreed to wait until May 1, 1875, for the balance due him.

The plaintiff asked the judge to rule that an agreement on his part to wait until some future day for his pay (the same being due and payable) would be null and void unless there was some consideration for the promise; and that a payment of $25 by the defendant to him on account (the whole amount being then due) would not constitute a consideration for such an agreement, and that, notwithstanding such an agreement, he could maintain his action brought before the future day. But the judge declined so to rule, and instructed the jury as follows: "If the jury find that the agreement was that, if the defendant would pay him $25 on the spot, he would wait for the balance of his pay till a day after the date of the writ, and the defendant made such payment and relied upon that agreement and neglected to pay the plaintiff in consequence, that, whether there was a consideration therefor or not, the action had been prematurely brought, and the plaintiff cannot recover." The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

By the Court. It is too well settled to require discussion or reference to authorities, that an agreement to forbear to sue upon a debt already due and payable, for no other consideration than the payment of part of the debt, is without legal consideration, and cannot be availed of by the debtor, either by way of contract or of estoppel.

Of the cases cited for the defendant, Harris *v.* Brooks, 21 Pick. 195, was a case of a surety, and Fleming *v.* Gilbert, 3 Johns. 528, a case of modification by agreement of the way of performing an obligation to discharge a mortgage. *Exceptions sustained.*

JOHN SHANLEY, Appellant, *v.* DAVID M. KOEHLER, Respondent

New York Supreme Court, Appellate Division, March Term, 1903

[*Reported in* 80 *New York Appellate Division,* 566]

Ingraham, J.: On May 15, 1896, the defendant recovered judgment against the plaintiff for $226.29. In July 1896, as an agreed settlement of this judgment the plaintiff paid the defendant $50, and gave his indorsed note for $50, with interest at six per cent. A receipt was given by the defendant's agent as part of the transaction which

provided that if the note was paid at maturity the judgment should thereby be satisfied. The note was duly paid and a receipt was then given by the defendant stating that he had received full settlement of his account. Nothing further was done until September 1902, when the plaintiff, having become the owner of real estate upon which this judgment was a lien, asked the defendant to enter of record the satisfaction of the judgment. The defendant declined to do so; whereupon the plaintiff brought this proceeding to cancel the judgment. The court below dismissed the complaint.

This precise question was presented in the case of Moss *v.* Shannon (1 Hilt. 175), where it was decided by the Court of Common Pleas that "the payment of part of a debt, and giving the debtor's note for part of the balance, can never discharge the whole indebtedness without a release. The debtor's note amounted to nothing. He only agreed by it to pay at a future time what he was bound to pay at the present moment, and afforded no new consideration for any contract at the time." This case was founded upon several cases in the Supreme Court, which are all discussed by Judge COWEN in Waydell *v.* Luer (5 Hill, 448). That case was subsequently reversed by the Court of Errors in 3 Denio, 412. The question presented in this case was not, however, presented there, and the reversal does not appear to have doubted the correctness of the rule that the giving by a debtor to a creditor of his own promissory note was not a consideration for an agreement that it should be received in full satisfaction of the debt, or, on payment of the note, an accord and satisfaction. (See opinion of DAVIS, P. J., in Parrot *v.* Colby, 6 Hun. 55.) In Ludington *v.* Bell (77 N. Y. 138) the question presented was whether the giving of his individual note by one of the members of a partnership after its dissolution for a copartnership debt was a good consideration for an agreement on the part of the creditor to release and discharge the maker from liability for the debt; and it was held that giving and accepting such a note under such an agreement was an accord and satisfaction of the copartnership debt and released the other members of the copartnership. The court, in that case, holds that the opinion of LOTT, Senator, in Waydell *v.* Luer (3 Denio, 410) was accepted by the court; that the acceptance of the individual note of one partner may be preferable and a better security than a demand against the firm. In Bliss *v.* Shwarts (65 N. Y. 444), the defendant claimed that the case was taken out of the general rule "because the acceptance by Kopper (acting for the plaintiff) of the draft of Butler & Co. on Duncan & Sherman was sufficient evidence of a new consideration to uphold the transaction, even though the plaintiffs did not participate in the general plan of compromise." In relation to this point the court said: "The evidence is entirely clear that the payment to be made to the plaintiffs was to be in cash. It was then shown in evidence that to

'carry out this settlement' Mr. Butler gave his draft on Duncan & Sherman to Kopper, acting for the plaintiffs. . . . The draft must be regarded merely as a mode of paying the cash." I cannot find that these cases, or the principle established in them have ever been questioned. It is true that the principle that the payment of a lesser sum in satisfaction of a greater is no consideration for an agreement to discharge the balance of the indebtedness has been criticised, but it has been universally recognized to be the rule and uniformly enforced. The courts have been inclined to limit the application of this rule and to seize hold of any benefit, however slight, to the creditor or any disadvantage to the debtor, and accept it as a consideration upon which an accord and satisfaction could be based. Judge ANDREWS in Allison *v.* Abendroth says (108 N. Y. 470): "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum,* and the doctrine of the common law to which we have adverted has no application." So in Jaffrey *v.* Davis (124 N. Y. 164) it was held that where one indebted on an open book account gave to his creditor his promissory notes for one-half of his debt, secured by a chattel mortgage under an agreement with the creditor that he would accept the same in full satisfaction and discharge of the debt, and the debtor paid the notes as they became due and the creditor satisfied the mortgage, the new agreement was valid and supported by a sufficient consideration. It may be that giving a creditor a promissory note for a portion of an amount resting in an open account, placing the creditor in a position which would enable him to more speedily obtain payment of the amount represented by the note, would be an advantage to the creditor, or disadvantage to the debtor, which would be a sufficient consideration to support the agreement to accept a lesser sum than claimed by the creditor, but in this case the defendant had obtained a judgment for his demand, and the amount due was then actually liquidated and determined. A receipt by him of the whole $100 in cash would clearly not have been a sufficient consideration for an agreement to discharge the remainder of the judgment, and the receipt of the judgment debtor's own promissory note for $50 would put the judgment creditor in no better position than he was in at the time the note was accepted. No possible advantage could accrue to him upon the receipt of this note which he did not have at the time the note was given. He had a judgment which he could enforce by execution. If the note was not paid he could enforce it in no other way than by a new action against the plaintiff which would result in a new judgment which would be no better security for the defendant than the judgment he had

already obtained. Nor was the giving of this note in any sense an injury to the plaintiff. Whether or not there is a consideration must appear from the facts of each particular case, and in this case it is quite evident that there was no consideration for the agreement.

It follows that judgment appealed from must be affirmed, with costs.[1]

Van Brunt, P. J., O'Brien, McLaughlin and Hatch, JJ., concurred.

Judgment affirmed, with costs.

TANNER *v.* MERRILL

Michigan Supreme Court, November 22–December 30, 1895

[*Reported in* 108 *Michigan,* 58]

Hooker, J. The defendants appeal from a judgment recovered against them at circuit. They are lumbermen, and the plaintiff worked for them at Georgian Bay, his transportation from Saginaw to that place having been paid by them. When he quit work, a question arose as to who should pay this, under the contract of employment, and defendants' superintendent declined to pay any transportation. The plaintiff needed the money due him to get home, and showed a telegram announcing the illness or death of his mother, and said that he must go home, to which the superintendent replied that "he did not pay any man's fare"; whereupon a receipt in full was signed, and the money due, after deducting transportation, was paid. The plaintiff testified that they had no dispute, only he claimed the fare and the superintendent refused to allow it.

The most important question arises over a request to charge upon the part of the defendants, which reads as follows:

"The testimony of the plaintiff is that, at the time the receipt put in evidence in this case was signed by him, he claimed that his railroad fare should not be deducted from his wages; that this was denied by the agents and superintendent of defendants, and it was taken out of his wages; that he then signed the receipt with full knowledge of its contents, and of the fact that his railroad fare had been taken out of his wages. This being so, the receipt in this case, upon the plaintiff's own testimony, cannot be contradicted. While a receipt may be contradicted in certain cases, it must be in a case of mistake, ignorance of fact, fraud, or when some unconscionable advantage has been taken of one by the other party. Therefore, the receipt, in this case, shows a full settlement of all claims plaintiff had against the defendants."

The only theory upon which it can be contended that this request

[1] The opinion has been abbreviated.

should have been given is that the plaintiff accepted less than he claimed, but no more than defendants' admitted, to be due, and gave a receipt in full when the defendants' superintendent refused to pay more. We do not discover any testimony tending to show an agreement to accept as payment, either in full or by way of compromise, except the receipt, and the question resolves itself into this: Whether a receipt in full is conclusive of the question of defendant's liability, when it is given upon payment of a portion of a claim admittedly due, accompanied by a refusal to pay more, in the absence of mistake, fraud, duress, or undue influence.

It is urged upon behalf of the plaintiff that receipts are always open to explanation, and that there is no consideration to support the acceptance of a portion of a valid claim as full payment. The cases which counsel cite do not support the broad contention of plaintiff's counsel, which would seriously derange business affairs if it should be sustained. The doctrine that the receipt of part payment must rest upon a valid consideration to be effective in discharge of the entire debt is carefully limited to cases where the debt is liquidated, by agreement of the parties or otherwise, which was not the case here. It was in dispute. In the case of St. Louis, etc., R. Co. *v.* Davis, 35 Kan. 464, the opinion says that "it is a well-settled principle of law that the payment of a part of an ascertained, overdue, and undisputed debt, although accepted as full satisfaction, and a receipt in full is given, does not estop the creditor from recovering the balance. In such a case the agreement to accept a smaller sum is regarded to be without consideration." The case of Day *v.* Gardner, 42 N. J. Eq. 199, was one where the agreement was to *forgive* a debt, implying its existence. In Hasted *v.* Dodge (Iowa), 35 N. W. 462, the opinion of Mr. Justice Rothrock shows the debt not to have been in dispute. Moreover, the doctrine was not applicable to the case for reasons shown. See also American Bridge Co. *v.* Murphy, 13 Kan. 35. In Bailey *v.* Day, 26 Me. 88, the claim was liquidated by judgment. In Hayes *v.* Insurance Co., 125 Ill. 639, the court apply the doctrine relied upon, but expressly state that "this rule has no application where property other than money is taken in satisfaction, or where there is an honest compromise of unliquidated or disputed demands." See also Bish. Cont. § 50; 2 Pars. Cont. 618. In Marion *v.* Heimbach, 62 Minn. 215, the Court say: "But where the claim is unliquidated, it would seem to be true that if the creditor is tendered a sum less than his claim, upon the condition that, if it is acepted, it must be in full satisfaction of his whole claim, his acceptance is an accord and satisfaction." See also Fuller *v.* Kemp, 138 N. Y. 231, where the same doctrine is held; Fire Ins. Ass'n *v.* Wickham, 141 U. S. 577. The important fact to ascertain is whether the plaintiff's claim was a liquidated claim or not. If it was, there was no consideration for the discharge. If not, the authorities are in substantial accord that part payment of

the claim may discharge the debt, if it is so received. Upon the undisputed facts, the claim of the plaintiff, *as made,* was not liquidated. It was not even admitted, but, on the contrary, was denied, because the defendants claimed that it had been partially paid by a valid offset. While the controversy was over the offset, it is plain that the amount due the plaintiff was in dispute. If so, it is difficult to understand how it could be treated as a liquidated claim, unless it is to be said that a claim may be liquidated piecemeal, and that, so far as the items are agreed upon, it is liquidated, and to that extent is not subject to adjustment on a basis of part payment. Cases are not numerous in which just this phase of the question appears. This would seem remarkable, unless we are to assume that, in calling a claim unliquidated, the courts have alluded to the whole claim, and have considered that, where the amount is not agreed upon, the claim as a whole is unliquidated, and therefore subject to adjustment. If this is not true, no man can pay an amount that he admits to be due without being subject to action whenever and so often as his creditor may choose to claim that he was not fully paid, no matter how solemn may have been his acknowledgment of satisfaction, so long as it is not a release under seal.

The general rule is a technical one, and there are many exceptions. It has been said that it "often fosters bad faith," and that "the history of judicial decisions upon the subject has shown a constant effort to escape from its absurdity and injustice." Harper *v.* Graham, 20 Ohio, 105; Kellogg *v.* Richards, 14 Wend. 116; Brooks *v.* White, 2 Metc. (Mass.) 283 (37 Am. Dec. 95). Again, it is said to be "rigid and unreasonable," and "a rule that defeats the expressed intentions of the parties, and, therefore, should not be extended to embrace cases not within the letter of it." Wescott *v.* Waller, 47 Ala. 492; Johnston *v.* Brannan, 5 Johns. 268; Simmons *v* Almy, 103 Mass. 35. See Milliken *v.* Brown, 1 Rawle, 391, where the rule is vigorously denounced. It has no application in cases of claims against the government. If one accepts the amount allowed, it is a discharge of the whole claim. U. S. *v.* Adams, 7 Wall. 463; U. S. *v.* Child, 12 Wall. 232. See also Wapello Co. *v.* Sinnaman, 1 G. Greene, 413; Brick *v.* County of Plymouth, 63 Iowa, 462; Perry *v.* Cheboygen, 55 Mich. 250; Calkins *v.* State, 13 Wis. 389. Again, it has been repeatedly held that part payment is a bar to a claim for interest. Another exception is found in composition with creditors.

It is believed that we may safely treat this claim as one claim, not as two, and as unliquidated, inasmuch as it was not admitted. In McGlynn *v.* Billings, 16 Vt. 329, the defendant, after an examination of accounts, claimed that he owed the plaintiff $82, and drew a check for that sum, and tendered it as payment in full. It was refused, and it was delivered to a third person, with directions to deliver it whenever the plaintiff would receive it as payment in full. This was done, and it was held to discharge the debt. In Hills *v.*

Sommer, 53 Hun, 392, the plaintiffs shipped lemons to dealers in St. Joseph, Mo., and were notified that some were defective, with a claim of a specific rebate, which plaintiffs refused to allow. A draft was subsequently sent for the amount which the defendants had previously expressed their willingness to allow, with a letter stating that it was in payment of the invoice. The draft was cashed, and action brought for the remainder of the claim. Verdict was directed for the defendants. Pierce *v.* Pierce, 25 Barb. 243, seems to be a similar case. In Potter *v.* Douglass, 44 Conn. 541, plaintiff refused $45, which was tendered in full payment of a claim. He took it, however, on account, as he said, and wrote a receipt to that effect, which defendant refused, for the reason that it stated that the money was received on account. The plaintiff, however, kept the money. It does not appear that this amount of $45 was disputed. Apparently, it was not. Yet the court called the claim an unliquidated demand, and held it to have been discharged. In Perkins *v.* Headley, 49 Mo. App. 562, it is said: "But if there is a controversy between him [the creditor] and his debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but tenders it on the condition that the creditor accept it in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction as a conclusion of law."

While no Michigan case decisive of this question is cited, and we recall none, it was held in Houghton *v.* Ross, 54 Mich. 335, that: —

"A receipt which states its purpose to be for a complete settlement, and which covers the whole period of dealing, is equivalent to an account stated; and though it is open to explanation as to errors or omissions, it cannot be treated as if it had not been meant to cover everything."

And in Pratt *v.* Castle, 91 Mich. 84, it was said that: —

"1. Settlements are favored by the law, and will not be set aside, except for fraud, mistake, or duress.

"2. A settlement evidenced by the execution of mutual receipts of 'one dollar, in full for all debts, dues, and demands to this date,' " except as to certain specified items, is conclusive, in the absence of fraud or mistake, as to all prior dealings between the parties not covered by the excepted items."

See also Dowling *v.* Eggemann, 47 Mich. 171.

It therefore appears that such settlements should have weight, and it seems reasonable to hold that the rule contended for does not apply, for the reason that this was an unliquidated demand, although a certain portion of it was not questioned. Clearly, the claim was disputed, and, so far as this record shows, the defendants' superintendent was given to understand that the money paid was accepted in full satisfaction, as plaintiff's own evidence shows that he gave the receipt without protest, and without stating to the defendants'

superintendent what he said, aside, to his fellow laborers, that it would make no difference if they did give the receipts. To hold otherwise would be a recognition of the "mental reservation" more effective than just. Upon the plaintiff's own testimony, he accepted the money, with the knowledge that the defendants claimed that the amount paid was all that was his due, and gave a receipt in full. There is nothing in the case to negative the inference naturally to be drawn from this testimony, that there was an accord and satisfaction of an unliquidated demand.

The judgment must be reversed. No new trial should be ordered.[1]

H. L. BENSON *v.* L. PHIPPS

TEXAS SUPREME COURT, March 4, 1895

[*Reported in* 87 *Texas,* 578]

GAINES, Chief Justice. The plaintiff was a surety for one Hosack, the principal maker upon a promissory note payable to the defendant in error. Some days after the note fell due, Hosack wrote defendant in error requesting an extension, to which request defendant replied by letter as follows: "I will extend the time of payment one year, and look with confidence for the accrued interest within sixty days, hoping it will not inconvenience you. After that, if it is your pleasure to make the interest on the extension payable semi-annually, it will help me."

The defendant in error testified to having received the letter from Hosack requesting an extension, and that the foregoing was his reply, but the contents of Hosack's communication were not otherwise shown. He also testified, that he was paid nothing for the extension, and that Hosack never paid the accrued interest.

Suit having been brought on the note by the payee against all the makers, the plaintiff in error pleaded his suretyship; and the facts as stated above having been proved, the trial court gave judgment for the plaintiff in that court. That judgment upon appeal was affirmed by the Court of Civil Appeals.

It is the right of the surety at any time after the maturity of the debt to pay it and to proceed against the principal for indemnity. This right is impaired if the creditor enter into a valid contract with the principal for an extension of the time of payment. The obligation of the surety is strictly limited to the terms of his contract, and any valid agreement between the creditor and the principal by which his position is changed for the worse, discharges his liability. For this reason it is universally held, that a contract be-

[1] Chicago, &c, Ry. Co. *v.* Clark, 178 U. S. 353, 367; Ostrander *v.* Scott, 161 Ill, 339, *acc.* See also Nassoiy *v.* Tomlinson, 148 N. Y. 326; Jordan *v.* Great Northern Ry. Co. 80 Minn. 405. Miller *v.* Coates, 66 N. Y. 609, *contra.*

tween the two, which is binding in law, by which the principal secures an extension of time, releases the surety, provided the surety has not become privy to the transaction by consenting thereto. If the creditor is not bound by his promise to extend, it is clear there is no release. In order to hold him bound by his promise, there must be a consideration. Whether a mere agreement for an extension by the debtor is sufficient to support a promise to extend by the creditor, is a question upon which the authorities are not in accord. We are of opinion, however, that the question should be resolved in the affirmative, at least in cases in which it is contemplated by the contract that the debt should bear interest during the time for which it is extended. If the new agreement was that the debtor should pay at the end of the period agreed upon for the extension precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract. In case of a debt which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is, that the creditor will forbear suit during the time of the extension, and the debtor forgoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest-bearing investment for a definite period of time. One gives up his right to sue for a period in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question, why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement was that the debt should be extended at a reduced rate of interest. That an agreement by the debtor and creditor for an extension for a definite time, the debt to bear interest at the same rate or at an increased but not usurious rate, is binding upon both, is held in many cases, some of which we here cite: Wood *v.* Newkirk, 15 Ohio St. 295; Fowler *v.* Brooks, 13 N. H. 240; Davis *v.* Lane, 10 N. H. 156; Stallings *v.* Johnson, 27 Ga. 564; Robinson *v.* Miller, 2 Bush (Ky.), 179; Reynolds *v.* Barnard, 36 Ill. App. 218; Chute *v.* Pattee, 37 Me. 102; Rees *v.* Barrington, 2 Ves. 540; see also Crossman *v.* Wohlleben, 90 Ill. 537; McComb *v.* Kittredge, 14 Ohio, 348.[1]

In many cases which seemingly support the contrary doctrine,

[1] Royal *v.* Lindsay, 15 Kan. 591; Shepherd *v.* Thompson, 2 Bush, 176; Alley *v.* Hopkins, 98 Ky. 668; Simpson *v.* Evans, 44 Minn. 419; Moore *v.* Redding, 69 Miss. 841; Fawcett *v.* Freshwater, 31 Ohio St. 637, *acc.*: Abel *v.* Alexander, 451 Ind. 523; Hume *v.* Mazelin, 84 Ind. 574; Holmes *v.* Boyd, 90 Ind. 332; Davis *v.* Stout, 126 Ind. 12; Wilson *v.* Powers, 130 Mass. 127; Hale *v.* Forbes, 3 Mont. 395; Grover *v.* Hoppock, 2 Dutch. 191; Kellogg *v.* Olmsted, 25 N. Y. 189; Parmelee *v.* Thompson, 45 N. Y. 58; Olmstead *v.* Latimer, 158 N. Y. 313, *contra*. See also Toplitz *v.* Bauer, 161 N. Y. 325.

there was a mere promise by the creditor to forbear, without any corresponding promise on part of the debtor not to pay during the time of the promised forbearance. In such cases, it is clear that there is no consideration for the promise. In others, where there was a mutual agreement for the extension, it may be that interest during the period of extension was not allowed by law, and the agreement did not provide for the payment of interest. The case of McLemore *v.* Powell, 12 Wheaton, 554, may have been of that character.

In this case, as we construe the correspondence between Hosack and the defendant in error, there was a request for an extension of the debt for twelve months on part of the former, and an unconditional acceptance on the part of the latter. We infer, that Hosack must have written something about the payment of accrued interest — properly that he hoped to be able to pay it in sixty days. The presumption is, that the letter was in the possession of the defendant in error at the time of the trial. He did not produce it. In any event, he should have known its contents, and if Hosack made his request for an extension conditional upon his payment of the accrued interest, he should have testified to the fact. We conclude, therefore, that there was a binding promise for an extension, and that the plaintiff in error was therefore released.[1]

There is error in the judgment, for which it must be reversed; and since it may be shown upon another trial that Hosack's offer contained a condition that he would pay the interest in sixty days, the cause is remanded. *Reversed and remanded.*[2]

THE AUSTIN REAL ESTATE AND ABSTRACT COMPANY *v.* G. A. BAHN

TEXAS SUPREME COURT, March 11, 1895

[*Reported in* 87 *Texas,* 582]

ON motion for rehearing.

GAINES, Chief Justice. This is a motion for a rehearing of an application, based upon the ground that our ruling in this case is in conflict with that made in the case of Benson *v.* Phipps, recently decided in this court.

When the application now before us was filed, it was considered that it probably involved the same question which was raised in Benson *v.* Phipps, and upon which a writ of error had been granted.

[1] An examination by the court of several Texas decisions is omitted.

[2] *Compare:* Hopkins *v.* Logan, 5 M. & W. 241; Vercycken *v.* Vandenbrooks, 102 Mich. 119; Stryker *v.* Vanderbilt, 3 Dutch. 68; McNish *v.* Reynolds, 95 Pa. 483; Gibson *v.* Daniel, 17 Tex. 173; McIntyre *v.* Ajax Mining Co., 20 Utah, 323, 336; Flanders *v.* Fay, 40 Vt. 316; Stickler *v.* Giles, 9 Wash. 147; Price *v.* Mitchell, 23 Wash. 742.

Action upon the application was accordingly suspended until that case was decided; and then it was discovered, that although the question of the validity of a promise for an extension of a contract of indebtedness was involved in each case, the two were clearly distinguishable. In this case, with reference to this question, the trial court found the facts as follows: "That a few days after the note sued on became due, and just before it was assigned to the plaintiff, N. E. Fain presented same to the defendant for payment, when said Stacy, as president of defendant company, requested that an extension of one week from that date be given on said note, and that the same be not placed in the hands of attorney for collection until one week; and agreed, if this was done, that he would pay the note within that time, etc. Here the creditor agrees to extend for one week, and the debtor agrees to pay within the week. He does not agree that he will not pay until the end of the week, or that in case he does pay, he will pay interest for the entire period of the extension. Hence there was no consideration for the promise of the creditor. In Benson *v.* Phipps, the principal maker of the note and the payee agree upon an extension for twelve months; from which the promise was implied on part of the former not to sue, and upon the latter not to pay within the stipulated time. The promise of the debtor to forego his right to pay at any time after the note was originally due, secured to the creditor the absolute right to receive the interest for the entire time of the extension, and constituted the consideration for the creditor's promise.

In the case before us, it was the right of the company to pay at any time, notwithstanding Fain's promise, and hence there was no consideration to support that promise.

The motion for a rehearing is overruled. *Motion overruled.*[1]

LATTIMORE and Others *v.* HARSEN

New York Supreme Court, August, 1817

[*Reported in* 14 *Johnson,* 330]

This was a motion to set aside the report of referees. It appeared from the affidavits which were read, that the plaintiffs entered into an agreement under seal, dated the 14th of November, 1815, with Jacob Harsen, and the defendant, Cornelius Harsen, by which the former, in consideration of the sum of nine hundred dollars, agreed to open a cartway in Seventieth Street, in the city of New York, the dimensions and manner of which were stated in the agreement, and bound themselves under the penalty of two hundred and fifty dollars to a performance on their part. Some

[1] McManus *v.* Bark, L. R. 5 Ex. 65 *acc.*

time after the plaintiffs entered upon the performance, they became dissatisfied with their agreement, and determined to leave off the work, when the defendant, by parol, released them from their covenant, and promised them that if they would go on and complete the work, and find materials, he would pay them for their labor by the day. The plaintiffs had received more than the sum stipulated to be paid to them by the original agreement. The action was brought for the work and labor, and materials found by the plaintiffs, under the subsequent arrangement, and the referees reported the sum of four hundred dollars and five cents in favor of the plaintiffs.

The case was submitted to the court without argument.

Per Curiam. The only question that can arise in the case is, whether there was evidence of a contract between the plaintiff and the present defendant to perform the services for which this suit is brought. From the evidence, it appears that a written contract had been entered into between the plaintiff and the defendant, together with his father Jacob Harsen, for the performance of the same work; and that, after some part of it was done, the plaintiffs became dissatisfied with their contract, and determined to abandon it. The defendant then agreed, if they would go on and complete the work, he would pay them by the day for such service, and the materials found, without reference to the written contract.

This is the allegation on the part of the plaintiffs, and which the evidence will very fairly support. If the contract is made out, there can be no reason why it should not be considered binding on the defendant. By the former contract, the plaintiffs subjected themselves to a certain penalty for the non-fulfilment, and if they chose to incur this penalty they had a right to do so, and notice of such intention was given to the defendant, upon which he entered into the new arrangement. Here was a sufficient consideration for this promise; all payments made on the former contract have been allowed, and perfect justice appears to have been done by the referees, and no rules or principles of law have been infringed. The motion to set aside the report, therefore, ought to be denied.

Motion denied.

GEORGE MUNROE *v.* THOMAS H. PERKINS

Supreme Judicial Court of Massachusetts, March Term, 1830

[*Reported in* 9 *Pickering,* 298]

Indebitatus assumpsit for work done, materials found, money paid, &c., brought against the defendant jointly with William Payne, who died after the action was commenced.

At the trial before the Chief Justice it appeared that in 1821

the plaintiff was employed by Perkins and Payne to build a hotel at Nahant, which was begun in that year and finished in 1823.

The general defence was, that there was a special contract, and that the work had been paid for according to the terms of that contract.

For the purposes of this case it was admitted that the amount of expenditures made and incurred by the plaintiff in and about the work, exceeded the amount of the payment made to him.

It appeared that in 1821 a number of persons associated themselves for the purpose of erecting a hotel at Nahant, and subscribed certain sums of money therefor; that Perkins and Payne were subscribers, and were the agents of the association, which was to be incorporated as soon as possible, and which was incorporated accordingly in February, 1822.

The defendant offered in evidence an agreement under seal, dated October 24, 1821, wherein the plaintiff engages to build the hotel according to a certain drawing and description, and the defendant and Payne, in behalf of their associates, agree to pay the plaintiff therefor $14,500 as the work advances.

T. W. Sumner, a witness called by the defendant, testified that the work was executed upon the basis of the drawing and description referred to in the sealed contract; that there were some deviations, consisting of additional work; that this was considered as extra work, not included in the contract, and was paid for separately according to its full cost and value.

To prove a waiver of the special contract, the plaintiff introduced several witnesses. J. Alley testified that in 1825 he said to the defendant, it was a pity Munroe had undertaken to build the hotel; to which the defendant replied, that Munroe would not lose anything by it, and that they had agreed to pay him for every minute's work and for all he had purchased. J. Mudge testified that in the spring of 1823 the plaintiff was indebted to the Lynn bank on a note for $1,100 which he wished to have renewed, but that the directors were not satisfied of his solvency; that in April of that year the plaintiff came to the bank with Payne, who said he was the agent who attended to the business of the Nahant hotel in the absence of Perkins, who had gone to Europe; that he wanted to get from the bank some indulgence towards the plaintiff; that the corporation would leave the plaintiff as good as they found him; they would pay Munroe for all he should lay out; that Munroe should not stop for want of funds; that he (Payne) knew Perkins's mind upon the subject; that the bills would be paid, and the plaintiff should not suffer. W. Johnson testified that on the strength of this representation of Payne, the bank renewed the plaintiff's paper. W. Babb testified that in May, 1822, the defendant asked the plaintiff how he got on; that the plaintiff said, poorly enough; that the defendant told him he must persevere; the plaintiff said he could

not without means; and the defendant repeated, "You must persevere," and added, "You shall not suffer, we shall leave you as we found you."

The defendant objected to this evidence that it was insufficient in law to set aside the special contract; that it did not amount to a waiver of the original contract, but so far as it proved anything, it was evidence of a new express promise, which was without consideration and from which no implied assumpsit could be raised. Also, that the conversation with Perkins at one time and with Payne at another were not joint promises and created no joint cause of action, but that the liability, if there was any, was several.

A verdict was taken by consent, subject to the opinion of the court.

S. Hubbard and *F. Dexter,* for the defendant.

Ward, contra.

Per Curiam. The verdict of the jury has established the fact, if the evidence was legally sufficient, that the defendant together with Payne, made the promise declared on. The defence set up was that the work was done and the materials were furnished on a special contract under seal, made by the defendant and Payne on behalf of themselves and other subscribers to the hotel; and such a contract was produced in evidence. The main question is, whether, there being this contract under seal for a stipulated sum, an action lies on a general assumpsit for the amount which the building actually cost; which is more than the sum specified in the contract. It is said on the part of the plaintiff that, having made a losing bargain and being unwilling and unable to go on with the work, Perkins and Payne assured him that he should not suffer; and that the work was carried on and finished upon their engagement and promise that he should have a reasonable compensation, without regard to the special contract. This engagement is to be considered as proved, if by law it was admissible to show a waiver of a special contract.

It is objected that, as the evidence was parol, it is insufficient in law to defeat or avoid the special contract; and many authorities have been cited to show that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract under seal cannot be avoided or altered or explained by parol evidence. That this is the general doctrine of the law cannot be disputed. It seems to have emanated from the common maxim, *Unumquodque dissolvitur eo ligamine quo ligatur.* But, like other maxims, this has received qualifications, and indeed was never true to the letter, for at all times a bond, covenant, or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c.

It is a general principle that where there is an agreement in writing, it merges all previous conversations and parol agreements; but

there are many cases in which a new parol contract has been admitted to be proved. And though when the suit is upon the written contract itself it has been held that parol evidence should not be received, yet when the suit has been brought on the ground of a new subsequent agreement not in writing, parol evidence has been admitted.

In Ratcliff *v.* Pemberton, 1 Esp. R. 35, Lord Kenyon decided that, to an action of covenant on a charter-party for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was the master and owner of the ship, verbally permitted the delay, and agreed not to exact any demurrage, but waived all claim to it. He laid down a similar rule in Thresh *v.* Rake, ibid. 53; where, however, the contract does not appear to have been under seal.

In 2 T. R. 483, there were articles of partnership, containing a covenant to account at certain times; and upon a balance being struck, the defendant promised to pay the amount of the balance; and it was held that assumpsit would lie upon this promise.

The case of Latimore *et al. v.* Harsen, 14 Johns. R. 330, comes nearer the case at bar. There the plaintiffs had agreed to perform certain work for a stipulated sum of money, under a penalty. After they had entered upon the performance of it, they determined to leave off, and the defendant, by parol, released them from their covenant, and promised them, if they would complete the work, that he would pay them by the day. The court held that if the plaintiffs chose to incur the penalty, they had a right to do so, and that the new contract was binding on the defendant.

In Dearborn *v.* Cross, 7 Cowen, 48, it is held that a bond or other specialty may be discharged or released by a parol agreement between the parties, especially where the parol agreement is executed; and the case of Lattimore *v.* Harsen is there cited and relied on.

There are other decisions of like nature in the same court; as Fleming *v.* Gilbert, 3 Johns. R. 528; Keating *v.* Price, 1 Johns. Cas. 22; Edwin v. Saunders, 1 Cowen, 250. In Ballard *v.* Walker, 3 Johns. Cas. 64, it was held that the lapse of time between the making of the contract and the attempt to enforce it was a waiver; which is going further than is necessary in the case before us, for here there is an express waiver.

In Le Fevre *v.* Le Fevre, 4 Serg. & R. 241, parol evidence was admitted to prove an alteration of the course of an aqueduct established by deed. In regard to the objection that this evidence was in direct contradiction to the deed, Duncan, J. remarks that "the evidence was not offered for that purpose, but to show a substitution of another spot. If this had not been carried into effect the evidence would not have been admissible; but where the situation of the parties is altered by acting upon the new agreement, the evidence is proper; for a party may be admitted to prove by parol

evidence, that after signing a written agreement, the parties made a verbal agreement, varying the former, provided their variations have been acted upon, and the original agreement can no longer be enforced without a fraud on one party."

The distinction taken in the argument, between contracts in writing merely and contracts under seal, appears by these authorities not to be important as it respects the point under consideration, and justice required in the present case, that the parol evidence should be received.

It was said that the promise of Payne cannot affect Perkins, and *vice versâ*. But as they were joint actors, and as when one acted in the absence of the other, it was always with a joint view to the same object, they cannot be separated, but must be considered as joint promisors.

The parol promise, it is contended, was without consideration. This depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterwards went on upon the faith of the new promise and finished the work. This was a sufficient consideration. If Payne and Perkins were willing to accept his relinquishment of the old contract and proceed on a new agreement, the law, we think, would not prevent it.

Motion for new trial overruled.[1]

LINGENFELDER ET. AL., EXECUTORS, *v.* THE WAINWRIGHT BREWING COMPANY, APPELLANT

MISSOURI SUPREME COURT, OCTOBER TERM, 1890

[*Reported in* 103 *Missouri,* 578.]

GANTT, P. J.[2] — The referee found that Jungenfeld, the plaintiffs' testator, was not entitled to the commission of five per cent on the cost of the refrigerator plant. He found that Jungenfeld's employment as architect was to design plans and make drawings and specifications for certain brewery buildings for the Wainwright Brewery Company and superintend their construction to completion for a

[1] Stoudenmeier *v.* Williamson, 29 Ala. 558; Bishop *v.* Busse, 69 Ill. 403; Cooke *v.* Murphy, 70 Ill. 96; Coyner *v.* Lynde, 10 Ind. 282; Holmes *v.* Doane, 9 Cush, 135; Rollins *v.* Marsh, 128 Mass. 116; Rogers *v.* Rogers, 139 Mass. 440; Thomas *v.* Barnes, 156 Mass. 581, 584; Brigham *v.* Herrick, 173 Mass. 460, 467. (But see Parrot *v.* Mexican Central R. Co. 207 Mass. 184); Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Goebel *v.* Linn, 47 Mich. 489; Conkling *v.* Tuttle, 52 Mich. 130; Scanlan *v.* Northwood, 147 Mich. 139; Osborne *v.* O'Reilly, 42 N. J. Eq. 467; Lattimore *v.* Harsen, 14 Johns. 330; Stewart *v.* Ketcltas, 36 N. Y. 388, *acc.* See also Peck *v.* Requa, 13 Gray, 407; King *v.* Duluth Ry. Co. 61 Minn. 482; Hansen *v.* Gaar, 63 Minn. 94; Gaar *v.* Green, 6 N. Dak. 48; Dreifus *v.* Columbian Co., 194 Pa. 475; Evans *v.* Oregon &c. R. Co. 58 Wash. 429.

[2] The statement of the case and a portion of the opinion are omitted.

commission of five per cent on the cost of the buildings. He found further that Jungenfeld's contract did not include the refrigerator plant that was to be constructed in these buildings. He further found, and the evidence does not seem to admit of a doubt as to the propriety of his finding, that this refrigerator plant was ordered not only without Mr. Jungenfeld's assistance, but against his wishes. He was in no way connected with its erection.

"Mr. Jungenfeld was president of the Empire Refrigerating Company and largely interested therein. . . . The De La Vergne Ice Machine Company was a competitor in business. . . . Against Mr. Jungenfeld's wishes Mr. Wainwright awarded the contract for the refrigerating plant to the De La Vergne Company. . . . The brewery was at that time in process of erection and most of the plans were made. When Mr. Jungenfeld heard that the contract was awarded he took his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery. The defendant was in great haste to have its new brewery completed for divers reasons. It would be hard to find an architect in Mr. Jungenfeld's place and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances Mr. Wainwright promised to give Jungenfeld five per cent on the cost of the De La Vergne ice machine if he would resume work. Jungenfeld accepted and fulfilled the duties of superintending architect till the completion of the brewery.

"As I understand the facts and as I accordingly formally find, defendant promised Jungenfeld a bonus to resume work and complete the original contract under the original terms.

"I accordingly submit that in my view defendant's promise to pay Jungenfeld five per cent on the cost of the refrigerating plant was without consideration, and recommend that the claim be not allowed."

The referee also find "that Mr. Jungenfeld never claimed that defendant had broken the contract or intended to do so, or that any of his legal rights had been violated."

The learned circuit judge, upon this state of facts, held that the defendant was liable on this promise of Wainwright to pay the additional five per cent on the refrigerator plant. The point was duly saved, and from the decision this appeal is taken.

Was there any consideration for the promise of Wainwright to pay Jungenfeld five per cent on the refrigerator plant? If there was not, plaintiff cannot recover the $3,449.75, the amount of that commission. The report of the referee, and the evidence upon which it is based, alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms.

It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent on the refrigerator plant, as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.

Jungenfeld himself put it upon the simple proposition that, "if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company" of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong.

"That a promise to pay a man for doing that which he is already under contract to do is without consideration," is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various States that nothing but the most cogent reasons ought to shake it. Harris *v.* Carter, 3 E. & B. 559; Silk *v.* Myrick, 2 Camp. 317; 1 Chitty on Contracts [11 Amer. Ed.] 60; Bartlett *v.* Wyman, 14 Johns. 260; Reynolds *v.* Nugent, 25 Ind. 328; Ayres *v.* Railroad, 52 Iowa, 478; Festerman *v.* Parker, 10 Ind. 474; Eblin *v.* Miller, 78 Ky. 371; Sherwin & Co. *v.* Brigham, 39 Ohio St. 137; Overdeer *v.* Wiley, 30 Ala. 709; Jones *v.* Miller, 12 Mo. 408; Kick *v.* Merry, 23 Mo. 72; Laidlou *v.* Hatch, 75 Ill. 11; Wimer *v.* Overseers of Poor, 104 Penn. St. 317; Cobb *v.* Cowdery, 40 Vt. 25; Vanderbilt *v.* Schreyer, 91 N. Y. 392.

But "it is carrying coals to Newcastle" to add authorities on a proposition so universally accepted and so inherently just and right in itself. The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration.

It is true that as eminent a jurist as Judge COOLEY, in Goebel *v.* Linn, 47 Michigan, 489, held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at $1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine and is not convincing, and certainly so much of the opinion as holds that the payment by a debtor of a part of his debt then due would constitute a defence to a suit for the remainder is not the law of this State, nor do we think of any other where the common law prevails.

The case of Bishop *v.* Busse, 69 Ill. 403, is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building, so as to require nearly double the number; owing to the increased price and change in the plans, the contractor notified the party for whom he was building, that he could not complete the house at the original prices, and, thereupon, a new arrangement was made, and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations and binding themselves thereby.

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum,* and will not lend its process to aid in the wrong.[1]

[1] Harris *v.* Watson, Peake, 72; Stilk *v.* Myrick, 2 Camp. 317; Fraser *v.* Hatton, 2 C. B. N. S. 218; Jackson *v.* Cobbin, 8 M. & W. 790; Mallalieu *v.* Hodgson, 16 Q. B. 689; Harris *v.* Carter, 3 E. & B. 559; Alaska Packers' Assoc. *v.* Domenico, 117 Fed. Rep. 99 (C. C. A.); In re Riff, 205 Fed. Rep. 406; National Elec. Signalling Co. *v.* Fessenden, 207 Fed. Rep. 915 (C. C. A.); Frankfurt-Barnett Co. *v.* William Prym Co. 237 Fed. Rep. 21 (C. C. A.) Shriner *v.* Craft, 166 Ala. 146; Feldman *v.* Fox, 112 Ark. 223; Main Street Co. *v.* Los Angeles Co., 129 Cal. 301; Poland Paper Co. *v.* Foote, 118 Ga. 458; Nelson *v.* Pickwick Associated Co., 30 Ill. App. 333; Golds. borough *v.* Gable, 140 Ill. 269; Moran *v.* Peace, 72 Ill. App. 135, 139; Allen *v.* Rouse-78 Il. App. 69; Mader *v.* Cool 14 Ind. App. 299; Ayres *v.* Chicago, &c. R. R. Co., 52 Ia. 478; McCarty *v.* Hampton Building Assoc., 61 Ia. 287; Awe *v.* Gadd, 179 Ia. 520; Westcott *v.* Mitchell, 95 Me. 377; Bell *v.* Oates 97 Miss. 790; Storck *v.* Mesker, 55 Mo. App. 26; Smith *v.* Sickenger, (Mo. App.) 202 S. W. 262; Easterly *v.* Jackson, 29 Mont. 496; Esterly Co. *v.* Pringle, 41 Neb. 265; Voorhees *v.* Combs, 33 N. J. L. 494; Natalizzio *v.* Valentino, 71 N. J. L. 500; Bartlett *v.* Wyman, 14 Johns. 260; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Carpenter *v.* Taylor, 164 N. Y. 171; Weed *v.* Spears, 193 N. Y. 289; Schneider *v.* Henschenheimer, 55 N. Y. Supp. 630; Festerman *v.* Parker, 10 Ired. 474; Gaar *v.* Green, 6 N. Dak. 48; Muir *v.* Morris, 80 Oreg. 378; Erb. *v.* Brown, 69 Pa. 216; Jones *v.* Risley, 91 Tex. 1; Tolmie *v.* Dean, 1 Wash. Ter. 46; Magoon *v.* Marks, 11 Hawaii, 764, *acc.* See also Hartley *v.* Ponsonby, 7 E. & B.

SHADWELL *v.* SHADWELL AND ANOTHER, EXECUTORS, &c.

IN THE COMMON PLEAS, November 26, 1860

[*Reported in* 30 *Law Journal Reports, C. P.* 145]

THE declaration stated that the testator in his lifetime, in consideration that the plaintiff would marry Ellen Nicholl, agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter addressed by the said testator to the plaintiff, which writing was and is in the words, letters, and figures following, that is to say: —

11TH AUGUST, 1838, GRAY'S INN.

MY DEAR LANCEY, — I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require.

Your ever affectionate uncle,

CHARLES SHADWELL.

Averment: That the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of 150*l.* each respectively; and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator; and that the plaintiff's annual income derived from his profession of a chancery barrister never amounted to six hundred guineas, which he was always ready and willing to admit and state to the said testator; and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, 12*l.*, of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue is still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the said five sums are still in arrear and unpaid.

Fourth plea: That before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the said marriage had been and was, without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl, of which the testator, before and at the time of making the supposed agreement and promise, also had notice; and the said marriage was, after the making of the supposed agreement and promise, duly had and solemnized as in the declara-

872; Eastman *v.* Miller, 113 Ia. 404; Proctor *v.* Keith, 12 B. Mon. 252; Eblin *v.* Miller's Exec. 78 Ky. 371; Endriss *v.* Belle Isle Ice Co., 49 Mich. 279; Conover *v.* Stilwell, 34 N. J. L. 54, 57.

tion mentioned, at the request of the plaintiff and without the request of the testator. And the defendants further say that, save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifth plea: To part of the claim of the plaintiff, to wit, so much thereof as accrued due in and after the year 1855, the defendants say that, although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue in practice and carry on the profession of such chancery barrister as aforesaid, and should not abandon the same; yet that, after the making of the said agreement and promise, and before the accruing of the supposed causes by this plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily, and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a chancery barrister, which before and at the time of the said making of the said supposed agreement and promise he had so carried on as aforesaid; and although the plaintiff could and might, during the time in this plea and in the declaration mentioned, have continued to practise and carry on that profession as aforesaid, yet the plaintiff, after such abandonment thereof, never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister, that is to say, as a barrister appointed yearly to revise the list of voters for the year for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Second replication to the fourth plea: That the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters, and figures following, and in none other, that is to say (setting out the letter as in the declaration above). Averment: That the plaintiff afterwards married the said Ellen Nicholl, relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked; and that he so married while his annual income derived from his profession of a chancery barrister did not amount, and was not by him admitted to amount, to six hundred guineas.

Second replication to the fifth plea: That the said agreement declared on was in writing, signed by the said testator, and was and is in the words, letters, and figures set out in the next preceding replication, and in none other; and that the terms upon which it is in the fifth plea alleged that the said agreement and promise were made, were no part of the agreement and promise declared on, and

the performance of them by the plaintiff was not a condition precedent to the plaintiff's right to be paid the said annuity.

Demurrers to the replications to the fourth and fifth pleas. Joinder in demurrer.

Bullar, in support of the demurrers.

V. Harcourt, in support of the replications.

Erle, C. J., now delivered the judgment of himself and Keating, J. The question raised by the demurrer to the replication to the fourth plea is, whether there was a consideration to support the action on the promise to pay an annuity of 150*l.* per annum. If there be such a consideration, it is a marriage; therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise, that is, in the letter of the 11th of August, 1838, and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are, that the plaintiff had made an engagement to marry Ellen Nicholl, his uncle promising him to assist him at starting, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be, namely, 150*l.* per annum during the uncle's life, and until the plaintiff's professional income should be acknowledged by him to exceed six hundred guineas; and a further averment, that the plaintiff, relying upon his promise, without any revocation on the part of the uncle, did marry Ellen Nicholl. Then, do these facts show that the promise was in consideration either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request? My answer is in the affirmative. First, do these facts show a loss sustained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassment, which would be in every sense a loss, if the income which had been promised should be withheld; and if the promise was made in order to induce the parties to marry, the promise so made would be, in legal effect, a request to marry. Secondly, do these facts show a benefit derived from the plaintiff to the uncle, at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares. The marriage primarily affects the parties thereto: but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him. The benefit is also derived from the plaintiff at the uncle's

request, if the promise of the annuity was intended as an inducement to the marriage; and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage. This is a consideration averred in the declaration, and it appears to me to be expressed in the letter, construed with the surrounding circumstances. No case bearing a strong analogy to the present was cited; but the importance of enforcing promises which have been made to induce parties to marry has been often recognized, and the cases of Montefiori *v.* Montefiori and Bold *v.* Hutchinson are examples. I do not feel it necessary to add any thing about the numerous authorities referred to in the learned arguments addressed to us, because the decision turns on a question of fact, whether the consideration for the promise is proved as pleaded. I think it is, and therefore my judgment on the first demurrer is for the plaintiff. The second demurrer raises the question, whether the plaintiff's continuing at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned, and I find no stipulation that the annuity shall cease if the professional diligence ceases. My judgment on this demurrer is also for the plaintiff; and I should state that this is the judgment of my brother Keating and myself, my brother Byles differing with us.

Byles, J. I am of opinion that the defendant is entitled to the judgment of the court on the demurrer to the second replication to the fourth plea. It is alleged by the fourth plea, that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry, and that there never was any consideration for the testator's promise, except what may be collected from the letter itself set out in the declaration. The inquiry, therefore, narrows itself to this question: Does the letter itself disclose any consideration for the promise? The consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff, I think the letter discloses no consideration. It is in these words: [His Lordship read it.] It is by no means clear that the words "at starting" mean "on marriage with Ellen Nicholl," or with any one else. The more natural meaning seems to me to be "at starting in the profession;" for it will be observed that these words are used by the testator in reciting a prior promise, made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration, that the annuity is not in terms made to begin from the marriage, but, as it should seem, from the date of the letter. Neither is it in terms made defeasible if Ellen Nicholl should die before marriage. But even on the assumption that the words "at starting" mean "on marriage," I still think that no consideration appears sufficient to sustain the promise. The

promise is one which by law must be in writing; and the fourth plea shows that no consideration or request, *dehors* the letter, existed, and therefore that no such consideration or request can be alluded to by the letter. Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration; but marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is, or may be, a detriment to the plaintiff, but detriment to the plaintiff is not enough, unless it either be a benefit to the testator, or be treated by the testator as such, by having been suffered at his request. Suppose a defendant to promise a plaintiff, "I will give you 500*l.* if you break your leg;" would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise, if the testator had said, "I will give you 100*l.* a year while you continue in your present chambers?" I conceive that the promise would not be binding for want of a previous request by the testator. Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point: Was the marriage at the testator's request? Express request there was none. Can any request be impled? The only words from which it can be contended that it is to be implied are the words, "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea, that that marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement as an accomplished fact. No request can, as it seems to me, be inferred from them. And further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage, or did cause it, so that the marriage can be said to have taken place at the testator's request, or, in other words, in consequence of that request? It seems to me, not only that this does not appear, but that the contrary appears; for the plaintiff, before the letter, had already bound himself to marry, by placing himself not only under a moral, but under a legal obligation to marry, and the testator knew it. The well-known cases which have been cited at the bar in support of the position, that a promise, based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person: see Herring *v.* Dorell and Atkinson *v.* Settree. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no

value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging, in the replication to the fourth plea, that he married relying on the testator's promise; but he shrinks from alleging that, though he had promised to marry before the testator's promise to him, nevertheless he would have broken his engagement, and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty, who yet is prepared to do his duty without those encouragements. At the utmost, the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation. In their judgment on the other portions of the record, I agree with the rest of the Court. *Judgment for the plaintiff.*[1]

ATTILIO DE CICCO, RESPONDENT, *v.* JOSEPH SCHWEIZER, APPELLANT

NEW YORK COURT OF APPEALS, October 15—November 13, 1917

[*Reported in* 221 *New York,* 431]

CARDOZO, J. On January 16, 1902, "articles of agreement" were executed by the defendant Joseph Schweizer, his wife Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the declaration of this controversy: "Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli, Now, in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of Two Thousand Five Hundred dollars, or the equivalent of said sum in Francs, the first payment of said amount to be made on the 20th day of January, 1902." Later articles provide that "for the same reason heretofore set forth," Mr. Schweizer will not change the provision made in his will for the benefit of his daughter and her issue, if any. The yearly payments in the event of his death are to be continued by his wife.

1 Chichester *v.* Cobb, 14 L. T. Rep. 433; Skeete *v.* Silberberg, 11 Times L. R. 491, *acc.* Compare Wright *v.* Wright, 114 Ia. 748; Boord *v.* Boord, Pelham (So. Aust.) 58, 64; Usher's Ex. *v.* Flood, 83 Ky. 552; Caborne *v.* Godfrey, 3 Desaus. 51

On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration for the promised annuity.

That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfilment of an existing legal duty. For this reason, it is insisted, consideration was lacking. The argument leads us to the discussion of a vexed problem of law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. There is general acceptance of the proposition that where A is under a contract with B, a promise made by one to the other to induce performance is void. The trouble comes when the promise to induce performance is made by C, a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C in return for a new promise by A, and a promise by C. in return for performance by A. Some jurists hold that there is consideration in both classes of cases (Ames, Two Theories of Consideration, 12 Harvard Law Review, 515; 13 id. 29, 35; Langdell, Mutual Promises as a Consideration, 14 id. 496; Leake, Contracts, p. 622). Others hold that there is consideration where the promise is made for a new promise, but not where it is made for performance (Beale, Notes on Consideration, 17 Harvard Law Review, 71; 2 Street, Foundations of Legal Liability, pp. 114, 116; Pollock, Contracts (8th ed.), 199; Pollock, Afterthoughts on Consideration, 17 Law Quarterly Review, 415; 7 Halsbury, Laws of England, Contracts, p. 385; Abbott *v.* Doane, 163 Mass. 433). Others hold that there is no consideration in either class of cases (Williston, Successive Promises of the Same Performance, 8 Harvard Law Review, 27, 34; Consideration in Bilateral Contracts, 27 id. 503, 521; Anson on Contracts [11th ed.], p. 92).

The storm-centre about which this controversy has raged is the case of Shadwell *v.* Shadwell (9 C. B. [N. S.] 159; 99 E. C. L. 158) which arose out of a situation similar in many features to the one before us. Nearly everything that has been written on the subject has been a commentary on that decision. There an uncle promised to pay his nephew after marriage an annuity of £150. At the time of the promise the nephew was already engaged. The case was heard before Erle, Ch. J., and Keating and Byles, JJ. The first two judges held the promise to be enforcible. Byles, J., dissented. His view was that the nephew, being already affianced, had incurred no detriment upon the faith of the promise, and hence that consideration was lacking. Neither of the two opinions in Shad-

well *v.* Shadwell can rule the case at bar. There are elements of difference in the two cases which raise new problems. But the earlier case, with the literature which it has engendered, gives us a point of departure and a method of approach.

The courts of this state are committed to the view that a promise by A to B to induce him not to *break* his contract with C is void (Arend *v.* Smith, 151 N. Y. 502; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Seybolt *v.* N. Y., L. E. & W. R. R. Co., 95 N. Y. 562; Robinson *v.* Jewett, 116 N. Y. 40). If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A, not merely to B, but to B and C jointly, to induce them not to *rescind* or *modify* a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

The defendant's contract, if it be one, is not bilateral. It is unilateral (Miller *v.* McKenzie, 95 N. Y. 575). The consideration exacted is not a promise, but an act. The Count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the Count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the Count, it was intended for the benefit of the daughter (Durnherr *v.* Rau. 135 N. Y. 219). When it came to her knowledge, she had the right to adopt and enforce it (Gifford *v.* Corrigan, 117 N. Y. 257; Buchanan *v.* Tilden, 158 N. Y. 109; Lawrence *v.* Fox, 20 N. Y. 268). In doing so, she made herself a party to the contract (Gifford *v.* Corrigan, *supra*). If the contract had been bilateral, her position might have been different. Since, however, it was unilateral, the consideration being performance (Miller *v.* McKenzie, *supra*), action on the faith of it put her in the same position as if she had been in form the promisee. That she learned of the promise before the marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they

forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. The distinction between a promise by A to B to induce him not to break his contract with C, and a like promise to induce him not to join with C in a voluntary rescission, is not a new one. It has been suggested in cases where the new promise ran to B solely, and not to B and C jointly (Pollock, Contracts [8th ed.], p. 199; Williston, 8 Harv. L. Rev. 36). The criticism has been made that in such circumstances there ought to be some evidence that C was ready to withdraw (Williston, *supra,* at pp. 36, 37). Whether that is true of contracts to marry is not certain. Many elements foreign to the ordinary business contract enter into such engagements. It does not seem a far-fetched assumption in such cases that one will release where the other has repented. We shall assume, however, that the criticism is valid where the promise is intended as an inducement to only one of the two parties to the contract. It may then be sheer speculation to say that the other party could have been persuaded to rescind. But where the promise is held out as an inducement to both parties alike, there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waiver; that one equally with the other must be strengthened and persuaded; and that recission or at least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result.

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a "living" option. This in itself permits the inference of detriment (Smith *v.* Chadwick, 9 App. Cas. 187, 196; Smith *v.* Land & House Corp. 28 Ch. D. 7, 16; Voorhis *v.* Olmstead, 66 N. Y. 113, 118; Fottler *v.* Moseley, 179 Mass. 295). "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, it is a fair inference of fact that he was induced to do so by the statement" (Blackburn,

L. J., in Smith *v.* Chadwick, *supra*). The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.

One other line of argument must be considered. The suggestion is made that the defendant's promise was not made *animo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its *motive* in the engagement of the daughter to the Count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise "unless the parties have dealt with it on that footing." (Holmes, Common Law, p. 292; Fire Ins. Assn. *v.* Wickham, 141 U. S. 564, 579). "Nothing is consideration that is not regarded as such by both parties" (Philpot *v.* Gruninger, 14 Wall. 570, 577; Fire Ins. Assn. *v.* Wickham, *supra*). But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the "consideration" for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiffs.

The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements; and seeks to uphold them. It puts them for many purposes in a class by themselves (Phalen *v.* U. S. Trust Co., 186 N. Y. 178, 181). It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference (McNutt *v.* McNutt, 116 Ind. 545; Appleby *v.* Appleby, 100 Minn. 408). It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfilment of engagements designed to influence in their deepest relations the lives of others.

The judgment should be affirmed with costs.

ENGLAND *v.* DAVIDSON

In the Queen's Bench, May 5, 1840

[*Reported in* 11 *Adolphus & Ellis,* 856]

Assumpsit. The declaration stated that heretofore, to wit, &c., the defendant caused to be published a certain hand-bill, placard, or advertisement, headed "Fifty pounds reward;" whereby, after reciting that, late on the night of, &c., the mansion-house of defendant, at, &c., was feloniously entered by three men, who effected their escape; that two men had been taken into custody on suspicion of having been concerned in the felony; and that a third, supposed to belong to the gang, had been traced to Carlisle, and was of the following description, &c., the defendant did promise and undertake that whoever would give such information as should lead to the conviction of the offender or offenders should receive the above reward: that plaintiff, confiding, &c., did afterwards, to wit, on, &c., give such information as led to the conviction of one of the said offenders, to wit, one David Robson; and that afterwards, to wit, at the Assizes for Northumberland, D. R., who was guilty of the said offence, to wit, the feloniously entering, &c., was in due course of law convicted of the said offence of feloniously entering, &c., in consequence of such information so given by plaintiff; of all which said several premises defendant afterwards, to wit, on, &c., had notice, and was then requested by plaintiff to pay him the said sum of 50*l.*; and defendant afterwards, to wit, on, &c., in consideration of the premises, then promised plaintiff to pay him the sum of 50*l.* Breach: that, although defendant, in part performance of his said promise and undertaking, to wit, on, &c., did pay to plaintiff the sum of 5*l.* 5*s.*, in part payment of the said sum of 50*l.*, yet, &c. (breach: non-payment of the residue).

Third plea: That heretofore, and long before and at the time when the house of defendant was so feloniously entered, and continually from thence hitherto, plaintiff was, and now is, a constable and police officer of the district where the said house of defendant is situate, and the said offence was committed; and it then was the duty of plaintiff, as such constable and police officer, to have given and to give every information which might lead to the conviction of the said offender, and to apprehend and prosecute him to conviction, if guilty, without any payment or reward to him made in that behalf: that, by the said advertisement partly set out in the declaration, defendant gave notice and promised that whoever would give such information to plaintiff, therein described as police officer Hexham, as should lead to the conviction of the offender or offenders, should receive the said reward in the said advertisement mentioned, and in no other manner whatever: and that, by reason of the premises, the said promise was and is void in law. Verification.

Demurrer: assigning for causes that the plea amounts to the general issue, and does not deny, or confess and avoid, and is multifarious, and tenders an immaterial issue. Joinder.

Ingham now appeared for the plaintiff; but the Court called on *Martin,* for the defendant. No consideration is shown on this record for the defendant's promise; the plaintiff was bound to do that, the doing of which is stated as the consideration. The duty of a constable is to do his utmost to discover, pursue, and apprehend felons. Com. Dig., Leet (M. 9), (M. 10); Justices of Peace (B. 79). It has been laid down that a sailor cannot recover on a promise by the master to pay him for extra work in navigating the ship, the sailor being bound to do his utmost, independently of any fresh contract. Harris *v.* Watson,[1] explained by Lord Ellenborough in Stilk *v.* Myrick.[2] The principle was recognized in Newman *v.* Walters,[3] where the case of a passenger was distinguished. [Coleridge, J. Those cases turn merely on the nature of the contract made by the sailor.] If the duty here incumbent on the plaintiff was to do all that the declaration lays as the consideration, the case is the same as if he had been under a previous contract to do all. The cases on the subject of consideration are collected in note (*b*) to Barber *v.* Fox. [*Ingham.* The constable was not bound to procure evidence.] The contract here declared upon is against public policy.

Lord Denman, C. J. I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

Littledale, Patteson, and Coleridge, JJ., concurred.

Judgment for the plaintiff.[4]

GEORGE F. POOL *v.* THE CITY OF BOSTON

Supreme Judicial Court of Massachusetts,

November Term, 1849

[*Reported in* 5 *Cushing,* 219]

This was an action of assumpsit brought in this court to recover the sum of $2000, as a reward to which the plaintiff alleged he was entitled, and was submitted to the court upon an agreed statement of facts, from which it appeared as follows: —

The city government of Boston having authorized the mayor to offer a reward "for the detection and conviction of any incendiary

[1] Peake, N. P. C. 72.
[2] 3 B. & P. 612.
[3] 2 Campb. 317; s. c. 6 Esp. 129.
[4] See Bent *v.* Wakefield Bank, 4 C. P. D. 1.

or incendiaries" who had set fire to any building in the city, or might do so, within a given period, the mayor accordingly offered the reward above mentioned "for the detection and conviction of said incendiary or incendiaries" within the time specified.

The plaintiff was a watchman of the city, duly appointed, and while in the performance of his duty as such watchman, discovered one Edmund Hollihan setting fire to a certain outhouse of one Chase, in the night of the 20th of September, 1845. The plaintiff thereupon made a complaint in the police court against Hollihan for burning a dwelling-house in the night time, upon which complaint he was committed for trial. He was afterwards indicted at the December term of the municipal court, 1845, for setting fire to the outhouse of Chase, in the night time following the 20th of September, 1845, and at the February term, 1846, was tried, found guilty, and sentenced to six months' imprisonment in the house of correction.

The plaintiff, thereupon, claimed the above reward of $2000, and brought this action to recover the same.

M. S. Clarke for the plaintiff.

P. W. Chandler, city solicitor, for the defendants.

WILDE, J. The defence to this action is, that the plaintiff has done no more than it was his duty as a watchman to do, and that a promise of a reward to a man for doing his duty is illegal, or void for want of consideration. The leading case in support of the defence is that of Stotesbury *v.* Smith, 2 Bur. 924, in which it was held, that it was illegal for the officer, in that case, to take money for doing his duty. He was a bailiff, and the defendant promised to pay him a sum of money, in case he would accept the defendant and another to be bail for a third person. It was decided, that no action could be maintained on such a promise. See also England *v.* Davidson, 3 P. & D. 594.

The same principle has been applied to promises made to persons not being public officers; such as promises to seamen to pay them extra wages for the performance of their duty.

"Every seaman," says Chancellor Kent, in his Commentaries (3 Kent, 185), "is bound, from the nature and terms of his contract, to do his duty in the service to the utmost of his ability, and, therefore, a promise made by the master when the ship is in distress to pay extra wages as an inducement to extraordinary exertion, is illegal and void." So it was held by Lord Kenyon, in the case of Harris *v.* Watson, Peake, 72. But it was held by Lord Ellenborough, that such a promise was not void on the ground of illegality, but on the ground of a want of consideration, which, as it seems to us, is better founded on general principles. Stilk *v.* Myrick, 2 Camp. 317; Bridge *v.* Cage, Cro. Jac. 103. But however this may be, it is well settled that such a promise is void.

So it has been decided, that a promise of extra compensation to a witness, in case he would attend court, and give testimony, at con-

siderable expense and inconvenience to himself, was void, and that he could only recover his fees allowed by law, he having done no more than he was in duty bound to do.

These decisions, and the principles on which they are founded, are decisive against the plaintiff's claim in the present case; it was his duty, when on the watch he discovered Hollihan setting fire to the outhouse, to make complaint, and cause him to be arrested, or to give notice to the mayor, or some other city officer, that they might prosecute him. He preferred himself to prosecute rather than to give notice to the city authorities; doubtless with the hope of entitling himself thereby to the large reward offered. But this will not help him. The principal object of the reward offered was to obtain the detection of the offender; the conviction was required to ascertain who was the offender. But to entitle the plaintiff to the reward, he must show that he is so entitled, as well for the detection as for the conviction of the offender. The reward cannot be apportioned. But the plaintiff is not entitled thereto for either service. He discovered the offender while he was on duty as a watchman, and was bound to give notice, or to cause him to be arrested; and he preferred the latter course; but he could not thereby subject the defendants to a liability, to which they would not be subject, if he had given notice to some one of the city officers.

For these reasons, briefly stated, and on principles well settled by the authorities, we are of opinion that this action cannot be maintained; and the plaintiff must become nonsuit.[1]

KEITH & HASTINGS, Admrs., &c. *v.* ALFRED MILES

Mississippi Supreme Court, October Term, 1860

[*Reported in* 39 *Mississippi* 442]

Error to the Probate Court of Panola County. Hon. J. T. M. Burbridge, judge.

H. A. Barr, for plaintiffs in error.

[1] Witty *v.* Southern Pacific Co., 76 Fed. Rep. 217; Union Pacific R. *v.* Belek, 211 Fed. 699; Morrell *v.* Quarles, 35 Ala. 544, 548; Grafton *v.* St. Louis, &c. Ry. Co., 51 Ark. 504; Lees *v.* Colgan, 120 Cal. 262; Matter of Russell's Application, 51 Conn. 577; Hogan *v.* Stophlet, 179 Ill. 150; Hayden *v.* Souger, 56 Ind. 42, 48; Taft *v.* Hyatt, 105 Kas. 35, 42; Marking *v.* Needy, 8 Bush, 22; Davies *v.* Burns, 5 Allen, 349; Studley *v.* Ballard, 169 Mass. 295; Hartley *v.* Granville, 214 Mass. 38; Foley *v.* Platt, 105 Mich. 635; Day *v.* Putnam, Ins. Co., 16 Minn. 408; *Ex parte* Gore, 57 Miss. 251; Kick *v.* Merry, 23 Mo. 72; Thornton *v.* Missouri, &c. Ry. Co., 42 Mo. App. 58; Ward *v.* Adams, 95 Neb. 781; Temple *v.* Brooks, 165 N. Y. App. D. 661; Gilmore *v.* Lewis, 12 Ohio, 281; Smith *v.* Whildin, 10 Pa. 39; Stamper *v.* Temple, 6 Humph. 113; Brown *v.* Godfrey, 33 Vt. 120, *acc.* If more is done than the legal duty requires there is sufficient consideration. Morrell *v.* Quarles, 35 Ala. 544; Chambers *v.* Ogle, 117 Ark. 242; Hayden *v.* Souger, 56 Ind. 42; Smith *v.* Fenner, 102 Kan. 830; Trundle *v.* Riley, 17 B. Mon. 396; Pilie *v.* New Orleans, 19 La. Ann. 274; Forsythe *v.* Murnane, 113 Minn. 181; McCandless *v.* Alleghany, &c. Co., 152 Pa. 139; Texas Cotton-Press Co. *v.* Mechanics' Co., 54 Tex. 319; Davis *v.* Munson, 43 Vt. 576; Reif *v.* Page, 55 Wis. 496. See also Bent *v.* Wakefield Bank, 4 C. P. D. 1; Long *v.* Neville, 36 Cal. 455.

The item in the account for board ought to have been allowed. The guardian had a right to command the ward to board with him, and the ward was under obligation to obey him. There was therefore no consideration for the promise of the guardian to board him without charge.

If the master of a ship promise his crew an addition to their fixed wages in consideration of extraordinary exertions during a storm, this promise is *nudum pactum* — the performance of an act which it was before legally incumbent on the party to perform, being in law an insufficient consideration. Chitty on Con. 54.

And so it would be in any case where the only consideration of the defendant's promise was the promise of the plaintiff to do, or his actually doing, something which he was previously bound to do. Chitty on Con. 54.

No counsel offered for defendant in error.

HARRIS, J., delivered the opinion of the court:

The defendant in error, when about ten or twelve years old, left the house of his guardian, Alexander Miles, plaintiffs' intestate, and went to the house of his uncle by marriage, "and there in the neighborhood remained until his guardian persuaded him to go and live with him, making him the following promises: that he, the guardian, would not charge him, the said defendant, any board; that he would send him to school and make no charge for the same." The defendant went to live with plaintiff's intestate, his said guardian, and remained there about twelve months.

On final settlement of the guardianship account, plaintiffs in error claimed allowance of sixty dollars for the board of defendant, and also amounts paid for tuition.

Exceptions were filed to these items in the court below, and sustained by the court. This writ of error is now prosecuted here to revise that judgment.

It appears in this record that the defendant paid no board at his uncle's house during his stay there; and upon this ground, we suppose, it was thought, in the court below, a sufficient consideration arose to sustain the promise of the guardian to board and school the defendant without charge.

Between adults, or where no duty of obedience existed, a promise made under these circumstances would doubtless be obligatory, upon the ground that injury and loss would otherwise be occasioned to defendant by his abandonment of his uncle's house, where he paid no board. But a different rule is held in cases where it is the legal duty of the promisee to do, without reward, the act induced by the promise sought to be enforced.

No action will lie to enforce a promise for doing that which it was the party's legal duty to do, without such promise or reward, "for this would be extortion and illegal." 2 Tucker's Lect. 137; 2 Burr. R. 924; 2 Black. R. 204; Chitty on Con. 54.

The ward in this case, being under the legal control of his guardian, had no right to rebel against his authority, leave his house, or refuse obedience to his lawful directions. It was his legal duty, as well as his highest interest, to submit himself cheerfully to the directions of his guardian; and he cannot be permitted to exact a reward for the performance of a duty so obviously incumbent on him. The law will not presume that injury or loss could arise to him in the discharge of that duty, and hence no consideration for the promise to board and school him could arise to support it, against his guardian.

The promise relied on to avoid the items of board and tuition claimed in the account of plaintiff's intestate being without consideration is void. The court therefore erred in rejecting these items on that ground.

Let the judgment and decree of the court below be reversed, and cause remanded for further proceedings in accordance with this opinion.[1]

WILLIAM McCLELLAN FINK *v.* H. S. SMITH, Appellant

Pennsylvania Supreme Court, May 22–July 18, 1895

[*Reported in* 170 *Pennsylvania,* 124]

Dean, J. Smith, the defendant, at a sheriff's sale of the personal property of one Sarah Hyde, wife of George Hyde, purchased a mare; then, as a mere act of kindness towards Mrs. Hyde, he left the animal temporarily with her; some months afterwards, George Hyde, the husband, sold the mare to Fink, the plaintiff, who took her into his possession; Smith, the owner, hearing of this, went to Fink and demanded his property, but he refused to surrender possession; then Smith informed Gallatin, the sheriff, who had sold her to him, of the wrong and threatened to replevy her; Gallatin replied that was not necessary as he would get her for him; Gallatin went to Fink, and obtained a promise from him to restore the mare to Smith without a replevin; then Smith again went to Fink, and the mare was delivered to him on the condition that, if on an indictment for larceny of the mare then pending against George Hyde there should be an acquittal, the mare should be returned, but if Hyde were convicted, Smith was to keep her. Hyde was acquitted of larceny. Thereupon, Fink replevied the mare. When the case came to trial, the facts turned out as we have stated them from the admissions of the parties and the findings ofthe jury. The verdict was for Fink, plaintiff, in damages to the value of the mare. Hence this appeal by Smith, defendant.

The controlling assignment of error and which in substance embraces all the error alleged is raised by the following excerpt from

[1] See also Orr *v.* Sanford, 74 Mo. App. 187.

the charge of the learned judge of the court below: "The only question remaining in this case is whether the mare was, under this agreement, to be returned to Fink, if Hyde was acquitted of the charge in court of the larceny of the mare. If so, then we instruct you that there was sufficient consideration for that agreement at the time of the lawsuit in order to recover her, and at the time this mare was involved in the threatened lawsuit; and the only way that he could get her without a lawsuit was by making this agreement that it is alleged on the part of plaintiff was made between Fink and Smith. If you believe such an agreement was made then your verdict should be for the plaintiff for the value of the mare with interest from that time."

Was this correct instruction, as to the law applicable to the evidence? There was no dispute as to the ownership of the property; the mare, it was conceded, belonged to Smith; and although he testified no such conditional bargain was made, it was just as positively testified to, on the other side, that it was made, and the jury have found the fact against him. So, we have the unquestioned owner of the mare bargaining with one in wrongful possession for her surrender; the possession thereafter to be determined by the verdict in a criminal prosecution then pending. Was his possession, thus obtained, wrongful as against Fink, when the event of the prosecution was the acquittal of Hyde? That depends on the validity of the contract between them.

1. The contract was void, because based on a fact which did not exist, though both parties assumed it to be a fact. Fink purchased from George Hyde; both assumed that Hyde's title would necessarily be determined by his acquittal or conviction of larceny; but the event of the prosecution in no wise determined that; it determined only that the evidence did not show, beyond a reasonable doubt, a felonious intent; what the weight of it showed, we do not know; but the admitted facts here, that the mare is Smith's, and that Hyde sold her, also show conclusively that Hyde was guilty of either larceny or trespass. So their assumption, that the criminal prosecution would determine Hyde's title, and necessarily theirs, was a mutual mistake of fact. "Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears such facts do not exist, the contract is inoperative." Horbach *v.* Gray, 8 W. 497; Miles *v.* Stevens, 3 Pa. 21; Willings *v.* Peters, 7 Pa. 287; Frevall *v.* Fitch, 5 Whart. 325.

2. There was no consideration to support Smith's promise. A promise made by the owner to obtain possession of his goods, which at the time are wrongfully withheld from him, is without consideration: Chitty on Contracts, p. 51; Addison on Contracts, 13. This principle is conceded by the learned judge of the court below, and the undoubted wrongful possession by Fink of Smith's property is also conceded. But he assumes, there is no evidence that Fink knew

this at the time he delivered it to Smith, and therefore the contract should be treated as a compromise of doubtful litigation, which is a good consideration to support a contract. But the error in this view is, that Fink's wrongful possession did not depend on what he knew, but on the fact. Was it Smith's property? Had he demanded it from him who wrongfully detained it? If these were the facts, and they are not denied, then there was no consideration for Smith's promise, for no benefit passed to Smith, and Fink sustained no loss by the contract; to hold that the abandonment of a wholly wrongful detention of another's property can form the basis of a compromise contract with the owner is direct encouragement to the commission of wrong for profit, and for this very reason the law holds the contract to be without consideration. If Fink had been indicted for the larceny of the mare, his knowledge of the ownership would have been material in determining his guilt, but it is of no moment in determining the fact of ownership.

3. While we think it is of doubtful public policy to enforce a contract, where the right to property is made to turn on a verdict in a criminal prosecution, in which both parties to the contract are witnesses, we do not decide the case on that point.

We are of opinion, however, the contract was based on a mutual mistake of a fact, which had no existence, and further, was without consideration. Therefore the judgment is reversed.[1]

LOUISA W. HAMER, Appellant, *v.* FRANKLIN SIDWAY, as Executor, Respondent

New York Court of Appeals, February 24–April 14, 1891

[*Reported in* 124 *New York,* 538]

Parker, J.[2] The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday, in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William

[1] Cowper *v.* Green, 7 M. & W. 633; Wendover *v.* Baker, 121 Mo. 273; Conover *v* Stilwell, 34 N. J. L. 54; Crosby *v.* Wood, 6 N. Y. 369; Tolhurst *v.* Powers, 133 N. Y. 460; Erny *v.* Sauer, 234 Pa. 330; Martin *v.* Armstrong, 62 S. W. Rep. 83 (Tex. Civ. App.), *acc.* Compare Rogers Development Co. *v.* Southern Calif. Ins. Co., 159 Cal. 735.

[2] A portion of the opinion is omitted.

E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him. Anson's Prin. of Con. 63.

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Parsons on Contracts, 444.

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." (Kent, vol. 2, 465, 12th ed.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him five thousand dollars. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the

promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.[1]

MILLER *v.* MILLER

IOWA SUPREME COURT, December 13, 1887

[*Reported in* 78 *Iowa,* 177]

ADAMS, C. J. The contract sued upon is in these words: "This agreement, made this fifth day of August, 1885, between the undersigned, husband and wife, in the interest of peace and for the best interests of each other and of their family, is signed in good faith by each party, with the promise, each to the other, and to their children, that they will each honestly promise to help each other to observe and keep the same, which is as follows, to-wit: All past causes and subjects of dispute, disagreement and complaint of whatever character or kind shall be absolutely ignored and buried, and no allusion thereto by word or talk to each other or any one else shall ever be made. Each party agrees to refrain from scolding, fault-finding and anger in so far as relates to the future, and to use every means within their power to promote peace and harmony, and that each shall behave respectfully, and fairly treat each other; that Mrs. Miller shall keep her home and family in a comfortable and reasonably good condition, and Mr. Miller shall provide for the necessary expenses of the family, and shall, in addition thereto, pay Mrs. Miller for her individual use two hundred dollars per year, payable, sixteen and two-thirds dollars per month, in advance, so long as Mrs. Miller shall faithfully observe the terms and conditions of their contract. They agree to live together as husband and wife and observe faithfully the marriage relation, and each to live virtuously with the other."

The petition demurred to is quite long. We cannot set it out. The defendant demurred upon the ground that it showed the contract to be without consideration and against public policy. His position is that the plaintiff merely agreed to do what by law she was bound to do. The majority think that the defendant's position must be sustained. The writer of this opinion is not able to concur in that view. The petition sets out several reasons, and inducements for making the contract. Among other things, it avers, in substance, that the defendant, while improperly spending money upon other women, refused to furnish the plaintiff necessary clothing, and

[1] Talbott *v.* Stemmons' Ex., 89 Ky. 222, *acc.* See also Lindell *v.* Rokes, 60 Mo. 249.

she had been compelled to furnish it herself by her personal earnings. This the demurrer admits. It appears to the writer, then, that the plaintiff had the right to separate from the defendant, and go where she could best provide for her wants. This right she waived in consideration of the defendant's contract sued upon. The waiver of the right, it seems to the writer, constituted a consideration for the contract; but, as the majority think otherwise, the judgment must be *Affirmed.*

Seevers, J., dissents from the majority, and concurs with the writer of the opinion.[1]

SEWARD & SCALES *v.* MITCHELL

Tennessee Supreme Court, April Term, 1860

[*Reported in* 1 *Coldwell,* 87]

This cause was tried at the November Term, 1859, before Judge Williams. Verdict and judgment for plaintiff. Defendant appealed.

T. J. Freeman, for plaintiffs in error.

M. R. Hill, for defendant in error.

Caruthers, J., delivered the opinion of the court: —

On the 16th Oct., 1856, Mitchell sold to Seward & Scales, for the consideration of $8,596.50, a tract of land in the county of Gibson, described in a deed of that date, by metes and bounds, "containing 521 acres, being a part of a 5,000 acre tract granted to George Dougherty, and bounded as follows," &c.

The title is warranted with the usual covenants, but nothing more said about the grants than what is above recited.

Some time after the deed was made, the parties, differing as to the quantity of land embraced in the tract, made an agreement that it should be surveyed by Gillespie, and if there were more than five hundred and twenty-one acres, the vendees should pay for the excess at the rate of $16.50 per acre, that being the price at which the sale was made, and if less, then the vendor should pay for the deficiency, at the same rate. It turned out that there was an excess of fifty-seven acres, and the tract embraced in the deed was five hundred and seventy-eight acres, instead of five hundred and twenty-one, as estimated in the sale. For this excess, the present suit was brought, and recovery had, for $1,079.

It is objected here that the court below erred in refusing to charge, as requested, that the agreement sued upon was void for want of a writing, and because there was no consideration for the promise.

[1] On rehearing the decision was affirmed on the ground that the agreement was opposed to public policy. This being so, the court held it was unnecessary to consider the question of consideration.

1. The contract, or promise sued upon, is not for the sale of land, so as to require a writing, under the Statute of Frauds.

The sale had already been reduced to writing. This was a subsequent collateral agreement in relation to the price, which was binding by parol, and to which the Statute can have no application whatever. This is too plain for argument.

2. There is more plausibility in the second objection, that there was no sufficient consideration for the promise. But this is also untenable. The argument is, that the deed embraced the whole tract, and passed a perfect title to the extent of the boundaries, and consequently there was nothing passing as a consideration for the new promise, that the party did not own before by a perfect legal right.

It is true, if the sale was by the tract and not by the acre, as appears from the deed, and no stipulations as to quantity, that the title was good for the whole and covered the excess. But if the sale was not in gross, but by the acre, and the recitation in the deed would not be conclusive in a court of equity on that point if the fact could be shown to be otherwise, then there would be mutual remedies for an excess or deficiency in proper cases, as we held in Miller *v.* Bents, 4 Sneed, and a more recent case; but independent of that, and taking it to have been purely a sale in gross, and both parties desiring to act justly, and being of different opinions as to the quantity, mutually agreed to abide by an accurate survey to ascertain which was bound to pay, and recover from the other, and what amount, we see no good reason in law or morals why such an agreement should not be binding upon them. The case of Howe *v.* O'Malley, 1 Murphey's L. and Eq. R., 287, is precisely in point. The court there held that a promise to refund in case of deficiency is a good consideration for a purpose to pay for any excess over what is called for in the deed, — that such mutual promises are sufficient considerations for each other.

The case of Smith *v.* Ware, 13 Johns. Rep. 259, which is supposed to conflict with this, is entirely different; "there was no mutuality" because the promise sued upon was to pay for the deficiency, without any obligation on the other party to pay for an excess, if any there had been.

The principle of the North Carolina case commends itself to our approbation, because of its equity and justice.

Without further citation of authorities we are satisfied to hold that the promise in this case was binding upon the defendant, as his Honor charged, and therefore affirm the judgment.[1]

[1] March *v.* Pigott, 5 Burr. 2802; Barnum *v.* Barnum, 8 Conn. 469; Howe *v.* O'Mally, 1 Murphey, 287; Supreme Assembly *v.* Campbell, 17 R. I. 402, *acc.* See also Beckley *v.* Newland, 2 P. Wms. 182; McElvain *v.* Mudd, 44 Ala. 48; Curry *v.* Davis, 44 Ala. 171; Pool *v.* Docker, 92 Ill. 501. But see *contra* Smith *v.* Knight, 88 Ia. 257.

BARNARD *v.* SIMONS

WRIT OF ERROR AT SERJEANTS' INN, MICHAELMAS TERM, 1616

[*Reported in* 1 *Rolle's Abridgment,* 26, *placitum* 39]

IF A. makes a void assumpsit to B., and afterwards a stranger comes to B., and, in consideration that B. will relinquish the assumpsit made to him by A., he promises to pay him 10*l.*, that is not a good consideration to charge him, because the first assumpsit was void.[1]

BIDWELL *v.* CATTON

HILARY TERM, 1618

[*Reported in Hobart,* 216]

BIDWELL, an attorney, brought an action of the case against Catton, executor of Reve, and counted that, whereas he had in Michaelmas Term, 14 Jac., prosecuted an attachment of privilege against Reve the testator, returnable in Hil. Term, the testator knowing of it, in consideration that, at his request, the plaintiff would forbear to prosecute the said writ any further against the said testator, the testator did promise to pay him 50*l.*, and then avers, &c. And after a verdict it was excepted in arrest of judgment:

First, that it was not alleged that the plaintiff had any just cause of action.

Secondly, that this action still remains. . . .

But the Court nevertheless gave judgment: For first, suits are not presumed careless, and the promise argues cause, in that he desired to stay off the suit. *Quære,* if the defendant had averred that there was no cause of suit.

Secondly, though this did not require a discharge of the action, yet it requires a loss of the writ, and a delay of the suit, which was both benefit to the one, and loss to the other. . . .

LOYD *v.* LEE

BEFORE PRATT, C. J., AT NISI PRIUS, 1718

[*Reported in* 1 *Strange,* 94]

A MARRIED woman gives a promissory note as a *feme sole;* and after her husband's death, in consideration of forbearance, promises to pay it. And now, in an action against her, it was insisted that,

[1] Farnham *v.* O'Brien, 22 Me. 475; Silvernail *v.* Cole, 12 Barb. 685; Hooker *v.* De Palos., 28 Ohio St. 257; Shuder *v.* Newby, 85 Tenn. 348, *acc.*

though, she being under coverture at the time of giving the note, it was voidable for that reason, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the C. J. held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise, where the contract was but voidable. And so the plaintiff was called.[1]

LONGRIDGE AND OTHERS *v.* DORVILLE AND ANOTHER

IN THE KING'S BENCH, October 29, 1821

[*Reported in* 5 *Barnewall & Alderson,* 117]

DECLARATION alleged, "that before the making of the promise, &c., a certain ship called the Carolina Matilda had then lately in a certain place, to wit, in the river Thames, to wit, at, &c., run foul of a certain other ship called the Zenobia, whereby the said last-mentioned ship had received great damage. And the said last-mentioned ship having received such damage in consequence of being so run foul of as aforesaid, the plaintiffs being the agents in that behalf of one —— Symonds, the owner of the Zenobia, and the defendants being the agents in that behalf of the owners of the Carolina Matilda, the former, as such agents, detained the Carolina Matilda till the owners of the said last-mentioned ship should have made good to them the damage so done to the Zenobia." It then stated, "that in consequence of such detention, the defendants undertook that they would, on the plaintiffs' renouncing all claims on the Carolina Matilda, and on proving the amount of the damages sustained by the Zenobia, indemnify the plaintiffs for any sum not exceeding 180*l.*, the exact amount to be ascertained when the said latter ship should have been repaired;" and then alleged that, in consequence of such undertaking, the plaintiffs did renounce all claim on the Carolina Matilda, and did permit and allow her to proceed on her voyage, and that the Zenobia had been repaired, and that the amount of such repairs was ascertained. There were also the common counts, and the defendants pleaded the general issue. The cause was tried before Abbott, C. J., at the Sittings after Easter Term, 1820, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case: —

The Norwegian ship, called the Carolina Matilda, on her voyage to Norway, in sailing down the river Thames in November last, ran

[1] Other early English decisions holding forbearance of a groundless claim insufficient consideration are collected in 12 Harv. L. Rev. 517, n. 2.

foul of the ship called the Zenobia, then lying at anchor, and in consequence of which the latter ship sustained considerable damage. The plaintiffs, acting as the agents of Mr. R. Symonds, the owner of the Zenobia, instituted a proceeding in the High Court of Admiralty against the ship Carolina Matilda, to compel her owners to make good the damages sustained by the Zenobia in consequence of being so run foul of. Process was issued against the Carolina Matilda, under which she was arrested at Gravesend on the 22d November last, and on the twenty-fourth day of the same month the defendants wrote a letter to the plaintiffs, of which the following is a copy: —

MESSRS. LONGRIDGE, BARNETT, AND HODGSON.

GENTLEMEN, — In consequence of your having detained the Norway ship Carolina Matilda till the owners make good to you the damage done to the Zenobia, bound to Smyrna, we hereby engage, on your renouncing all claims on the said ship Carolina Matilda, and on proving the amount of damages sustained by the Zenobia, to indemnify you for any sum not exceeding 180*l.*, the exact amount to be ascertained when the Zenobia is repaired.

The defendants were the agents of the owners of the Carolina Matilda; and upon the receipt of this letter the plaintiffs withdrew proceedings in the Admiralty Court, and the officer, then in possession of the Carolina Matilda, was then also withdrawn, and such possession delivered up to the defendants, acting on behalf of her owners. The Zenobia had been since repaired, and the amount of damages sustained by her had been ascertained. At the time the Carolina Matilda sailed, and while she was proceeding down the river and ran foul of the Zenobia, she had the regular Trinity House pilot aboard, who had been placed there by the defendants.

Puller, for the plaintiff. It is not necessary to consider the question whether the owners of the Carolina are liable for the damage done to the Zenobia, under the circumstances of the case; for the defendants have made themselves liable by an express promise, founded upon a good consideration. The plaintiffs agree to release the ship, which they might otherwise have detained until bail was given; and the defendants agree to pay a stipulated sum by way of damage; waiving all question as to the legal liability of the owners. That might be considered as doubtful, there having been contradictory decisions.[1] The defendants, or their principals, therefore, have obtained a benefit by the immediate release of the ship; and that constitutes a good consideration for the promise laid in the declaration.

F. Pollock, contra. There is no sufficient consideration for the promise in the declaration, because the plaintiffs had no ground for instituting the suit in the Admiralty Court against the Carolina. The question whether the defendants are liable upon their undertaking must depend upon this, whether the owners were liable for the injury, the ship at the time having on board a pilot, as required

[1] Neptune the Second, 1 Dobson, Adm. R. 467; Ritchie *v.* Bowsfield, 7 Taunt. 309.

by the act of Parliament. If they were not liable, the plaintiff had no right to institute the suit in the Admiralty Court; and the forbearance of a suit, where a party is not liable, is not a good consideration. Tooley *v.* Windham[1] and King v. Hobbs[2] are authorities in point.

Abbott, C. J. I am of opinion that there is a sufficient consideration in this case to sustain the promise, without inquiring whether the owners of the ship are liable under the circumstances of the case. It appears that a suit had been instituted by the plaintiffs in the Court of Admiralty against the Carolina Matilda, to compel her owners to make good the damage done by her running foul of another vessel. The ship might have been redeemed from that suit by the defendants' giving bail that proper care should be taken of the ship, and that those on board her should not leave the kingdom until means were taken to secure that evidence which would enable the judge to decide the suit, and the plaintiffs might have insisted on such bail. The defendants, as agents for the foreign owners of the ship, write a letter, in which they engage, on the plaintiffs' renouncing all claims on the ship, and on proving the amount of damages sustained by the Zenobia, to indemnify them for any sum not exceeding 180*l.*, the exact amount to be ascertained when the Zenobia is repaired. Now the plain meaning of that engagement appears to me to be this: Release the ship, and we will waive all questions of law and fact, except the amount of damage; we will pay you 180*l.*, if the damage done amounts to that sum. The plaintiffs, by not insisting upon the bail required, therefore relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject; and the parties agree to put an end to all doubts on the law and the fact, on the defendants' engaging to pay a stipulated sum. I am of opinion that this case is distinguishable from those cited in argument, inasmuch as in this case the law was doubtful, and the parties agreed to waive all questions of law and fact. I am therefore of opinion that the plaintiff is entitled to recover.

Bayley, J. I am of the same opinion. Where a cause is depending, it is competent to a party to refer the questions of liability and damage jointly, or to acknowledge his liability, and refer the question of damage only; and in this case, I think, the effect of the agreement is, that they, the defendants, acknowledge the liability of the owners, and, in consideration of the plaintiffs releasing the ship, they agree to refer the question as to the amount of damage, and pay the same, provided it does not exceed 180*l.* If it had appeared in this case that the owners of the Carolina could not have been liable at all, I agree that the consideration for the promise would have failed. But the facts stated in the case by no means show

[1] Cro. Eliz. 206. [2] Yelv. 25.

that the owners would not have been liable; for by the pilot act the owners are only protected in those cases where the loss arises from the default, neglect, incapacity, or incompetency of the pilot. Now there is no fact in this case which shows that the misconduct of the pilot was the cause of the injury.

Holroyd, J. I am of the same opinion. If a person is about to sue another for a debt, for which the latter is not answerable, the mere consideration of forbearance is not sufficient to render him liable for that debt. Any act of the plaintiff, however, from which the defendant derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, is a sufficient consideration to support a promise. Now the consideration of forbearance is a benefit to the defendant, if he be liable; but it is not any benefit to him, if he be not liable. The authorities cited proceed on that ground. This case differs materially from those; for here a suit actually commenced is given up, and a suit too the final success of which was involved in some doubt. The plaintiff might sustain a detriment by giving up all claim in respect of the expenses incurred, and the defendant might derive a benefit by having that suit put an end to, without further trouble or investigation. Now I am of opinion that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up the ship, which might otherwise have been detained until the security required was given, is a good consideration to support a promise to pay a stipulated sum by way of damage, in case the actual damage amount to that sum. In Com. Dig., tit. Action upon the Case upon Assumpsit (F. 8), it is laid down that an action does not lie if a party promise in consideration of a surrender of a lease at will, for the lessor might determine it; unless there was a doubt whether it was a lease at will or for years; and 1 Rol. 23, 1. 25, 35, and 1 Brownlow, 6, are cited. That is an authority to show that the giving up of a questionable right is a sufficient consideration to support a promise. Here, therefore, the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise. I think, therefore, that this action is sustainable.

Best, J., concurred.

HERRING *v.* DORELL

In the Queen's Bench, Trinity Term, 1840

[*Reported in* 8 *Dowling's Practice Cases,* 604]

R. V. Richards showed cause against a rule *nisi,* obtained by *V. Williams* for arrest of judgment or a new trial in this case. The case had been tried before the sheriff of Brecon, and a verdict found in favor of the plaintiff for 2*l.* 10*s.* 1*d.* The ground of seek-

ing to arrest the judgment was, that no sufficient consideration for the promise by the defendant was disclosed on the face of the declaration. The substance of the declaration was, that a person named Watkins and a person named Voss were joint debtors to the plaintiff. The plaintiff proceeded against them, and ultimately took Watkins and Voss in execution. An arrangement was made between Watkins and the plaintiff, and accordingly the former was discharged out of custody. Voss remained in custody, and in consideration of the discharge of Voss, the declaration alleged that the defendant undertook to pay the sum of 2*l.* 10*s.* 1*d.* due from Voss to the plaintiff, and Voss was accordingly discharged. It was contended in support of the rule that, the plaintiff having discharged Watkins, who was jointly liable with Voss, that had the effect of entitling Voss to his discharge. *Richards* submitted that, even after the discharge of Watkins, some step being necessary in order to obtain the discharge of Voss, some portion of his imprisonment, until that step could be taken, must be considered as lawful. Suppose the prisoners had been confined in two different gaols, one in Cornwall and the other in Northumberland, and one of them was discharged in Cornwall, some time must be allowed in order to discharge the other defendant from the gaol in Northumberland. The detention of the second defendant until his discharge must be considered as lawful. The smallest consideration was sufficient to support the promise alleged in the declaration, and here was some consideration for that purpose. If the proceeding could be considered as a nullity then the plaintiff would be liable to an action of trepass; but in Crozer *v.* Pilling, it appeared that an action on the case was the proper remedy, and not an action of trespass. There it was held that a plaintiff is bound to accept from a defendant in custody under a *ca. sa.* the debt and costs when tendered in satisfaction of the debt, and to sign an authority to the sheriff to discharge the defendant out of custody; and that an action on the case will lie against the plaintiff for maliciously refusing so to do. The case of Smith *v.* Eggington[2] was an authority to the same effect. The imprisonment was legal in its commencement, and therefore the sheriff could not be liable as a trespasser. It was not therefore a void imprisonment. The case of Atkinson *v.* Bayntun[3] was an authority to show that sufficient consideration was disclosed on the face of this declaration to support the defendant's promise. The marginal note was: "M. being in custody on execution pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, defendant, in consideration that plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution. Held, that defendant's was a valid contract." He cited Sturlyn *v.* Albany, and Pullin *v.* Stokes.[4] There, A. having recovered judg-

[1] 4 B. & C. 26 [2] 6 Dowl. P. C. 38. [3] 1 B. N. C. 444. [4] 2 H. Bl. 312.

ment against B., and a *fi. fa.* being delivered to the sheriff, in consideration that A. at the special request of C. had requested the sheriff not to execute the writ, C. promised to pay A. the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges. On a judgment by default and error brought, the promise was holden to be binding on C., though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c., was, nor that the defendant had notice of such amount. In the present case, Voss was not taken in execution after the discharge of Watkins, but both were legally in custody at the time of Watkins's discharge. The detention of one prisoner in such a case could not be considered as a trespass. But suppose it should be said that the plaintiff was bound to take steps to discharge Voss; if he was, he was entitled to a reasonable time for that purpose. During the time that elapsed before his actual discharge, he was in legal custody. That custody furnished a sufficient consideration to support the defendant's promise.

V. Williams, in support of the rule.

Coleridge, J. The question in this case, whether this was a good consideration or not, depends upon the situation of Voss at the time of his discharge. Both he and Watkins had been taken under a joint execution. Watkins made certain terms with the plaintiff, and the latter voluntarily discharged him. No terms were made as to the situation of Voss; his rights were, therefore, to be considered according to the situation in which the law had placed him. Suppose Watkins alone had been in custody, it is clear that the voluntary discharge of him would have been a discharge of the debt, and no other proceedings could have been taken to recover it. It seems to me, in the same way, that the discharge of Watkins operated to release Voss, his co-debtor. I think therefore, both on principle and authority, that this rule ought to be made absolute.

Rule absolute.[1]

CALLISHER *v.* BISCHOFFSHEIM

In the Queen's Bench, June 6, 1870

[*Reported in Law Reports, 5 Queen's Bench,* 449]

Declaration that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the government of Honduras, and from Don Carlos Guttierez and others, and had threatened and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that the plaintiff would forbear from taking

[1] Commonwealth *v.* Johnson, 3 Cush. 454, *acc.* See also Rood *v.* Jones, 1 Doug. 192.

such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds or debentures, called Honduras Railway Loan Bonds, for sums to the amount of 600*l.* immediately the bonds should be printed. Averment: that the plaintiff did not take any proceedings during the agreed period or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach: that the defendant had not delivered to the plaintiff the bonds or any of them.

Plea: That at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

James, Q. C. (*Rose* with him), in support of the demurrer.

Pollock, Q. C. (*Joyce* with him) contra.

Cockburn, C. J. Our judgment must be for the plaintiff. No doubt it must be taken that there was in fact no claim by the plaintiff against the Honduras government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that, if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it; and if he *bonâ fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage; and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras government, that would have been an answer to the action.

Blackburn, J. I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain moneys were due to him from the Honduras government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far, the agreement was a reasonable one. The plea, however, alleges that at the time of making the agreement no money was due. If

we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by Cook *v.* Wright. In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court say that "the real consideration depends on the reality of the claim made, and the *bonâ fides* of the compromise." If the plaintiff's claim against the Honduras government was not *bonâ fide,* this ought to have been alleged in the plea; but no such allegation appears.

Mellor, J. I am of the same opinion. If the plaintiff's claim against the Honduras government was fraudulent, the defendant ought to have alleged it.

Lush, J., concurred. ***Judgment for the plaintiff.***

MILES *v.* NEW ZEALAND ALFORD ESTATE COMPANY

In the Chancery Division, June 22–24, 1885, February 4–6, 11, 1886

[*Reported in* 32 *Chancery Division,* 266]

The plaintiff in 1882 accepted bills for £10,000 for the accommodation of Samuel Grant, one of the defendants in this suit, and to secure the plaintiff Grant had charged 125 shares which he owned in the defendant corporation with this sum. The plaintiff gave notice to the company of his interest in the shares.

Grant, besides being a promoter of the company and the holder of the above-mentioned shares, was the vendor to the company of the property in New Zealand known as the Alford estate, the acquisition and working of which was the substantial object of the formation of the company. He was also the chairman of the board of directors, and at a general meeting of the company held on the 15th of March, 1883, an angry discussion took place, at the close of which he gave to the company a written guarantee or warranty signed by himself in the following terms: —

"Gentlemen, I hereby guarantee that a dividend (duly earned during the year) of not less than £3 per centum per annum be paid to the shareholders for the year ending the 30th of June, 1883, and afterwards that there shall be paid to them a yearly dividend of not less than £5 per centum per annum (duly earned during the year) for a period of ninety years; and I undertake within three calendar months after the end of any and every year to pay to you any sum requisite to pay the agreed minimum dividend if the company has not earned it."

No resolution was passed at the general meeting with reference to the giving of the guarantee.

Grant was adjudicated a bankrupt on the 19th of February, 1884. In May, 1884, there being due to the plaintiff from Grant the sum of £7,885, he applied to the company to do and concur in all acts necessary for effecting a sale and transfer of the 125 shares.

The company, however, claimed a lien on the shares under the guarantee given to them by Grant and their articles of association, in priority to the plaintiff's charge; and they refused to permit any sale or transfer of the shares until their claim was satisfied. The plaintiff then brought this action against the company and Grant and his trustee in bankruptcy, and claimed a declaration that under the deed of the 19th of October, 1882, he was entitled to a first charge on the 125 shares for the principal and interest secured thereby; and he pleaded that the guarantee given by Grant was not under seal, that no consideration had been given for it, and that even if consideration had been given, the document did not comply with the requirements of the Statute of Frauds.

The evidence upon the question whether any consideration was in fact given for a guarantee was chiefly derived from an affidavit of Mr. J. Redmayne, the secretary of the company, the material paragraphs of which were as follows: —

"1. . . . The defendant Grant made many representations to the persons who originally formed the company, and to persons who became shareholders thereof, to the effect that the Alford estate was of great value, and to the effect that the labor expenses in working the said estate did not exceed a stated sum, and other representations calculated to induce such persons to find moneys to form and become shareholders in the company.

"3. It was subsequently and some time before the meeting hereinafter mentioned discovered that the statements made by the defendant Samuel Grant as to the value of the estate were untrue, and that the labor expenses greatly exceeded the amount stated by him as aforesaid.

"4. Claims were accordingly made on the defendant Samuel Grant by the defendant company and on behalf of the shareholders thereof, and it was intimated that proceedings would be taken to set aside the sale and recover the purchase-money from him.

"5. At the general meeting of the defendant company on the 15th day of March, 1883, . . . the threatened proceedings against the defendant Samuel Grant were the main subject discussed by the shareholders. The defendant Samuel Grant was told that it was the intention of the defendant company to take immediate proceedings against him, and he thereupon made two or three offers with a view to the settlement of the matter and to compromise the claim and escape legal proceedings, and eventually he offered to sign the guarantee in the said affidavits mentioned in consideration of the de-

fendant company and the said shareholders agreeing to abandon the contemplated proceedings against him and agreeing to give up their claims against him which were the subject of the intended proceedings.

"6. The defendant company and the shareholders were advised that their claims were substantially of such a nature that if not enforced at once they could not be enforced at all, and such claims were, in fact, claims for rescission of contract which could not be equitably enforced if proceedings were not immediately taken; and the defendant company, in pursuance of the said agreement under which the said guarantee was signed, and in consideration of the said guarantee, abandoned the intention of taking such proceedings and gave up such claims and did not commence any proceedings or assert any claim.

At the trial NORTH, J., held that the claim of the company was valid, the forbearance being a sufficient consideration under Callisher *v.* Bischoffsheim, L .R. 5 Q. B. 449, and other recent decisions; but that the company could not by its by-law entitle itself to priority over the plaintiff.

From this judgment the company appealed.

Barber, Q. C., and *Blake Odgers,* in support of the appeal.

Davey, Q. C., and *Stirling,* for the plaintiff.

COTTON, L. J. . . . But then comes the question, had the company in fact any legal claim as against Grant? Their claim was under a letter signed by Grant which guarantees or undertakes that a certain yearly dividend shall be paid to the shareholders during a long period of years; and it is objected that no consideration appears upon the face of the letter, and that no consideration was in fact given to Grant for that promise (I call it "promise," because to call it "contract" would be to assume there was consideration) given by the shareholders.

Now there was much argument upon the question what is a good consideration for a compromise; and there are authorities which for a considerable time were considered as laying down the law upon the subject; but Lord Esher, the present Master of the Rolls, in *Ex parte Banner,* 17 Ch. D. 480, is supposed to have thrown doubts on these authorities; and what he said was in fact that if the question ever came before this court the authority of Callisher *v.* Bischoffsheim, Law Rep. 5 Q. B. 449, Ockford *v.* Barelli, 20 W. R. 116, and Cook *v.* Wright, 1 B. & S. 559, would have to be considered.

Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good "consideration" for a contract; and if that is the law, what we really have to now consider is whether in the present case there is any evidence on which the court ought to find that there was a serious claim in fact made, and whether a contract to abandon that claim was the consideration for this letter of guarantee. I am not

going into the question at present as to how far the Statute of Frauds will raise any difficulty in the way. And I think also that the mere fact of an action being brought is not material except as evidence that the claim was in fact made. That, I think, was laid down by Lord Blackburn in Cook *v.* Wright, and also in Callisher *v.* Bischoffsheim, and, subject to the question whether these cases are overruled, or ought to be considered as unsound, that, I think, is a correct statement of the law. Now, by "honest claim," I think is meant this, that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one. Of course, if both parties know all the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in Cook *v.* Wright, 1 B. & S. 559; and Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449; and Ockford *v.* Barelli, 20 W. R. 116. What was stated in Cook *v.* Wright, 1 B. & S. 569, by Lord Blackburn is this: "We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise." Again, what his Lordship says in the subsequent case of Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 452, is this: "If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated." The doubt of the Master of the Rolls seems to have been whether a compromise would not be bad, or a promise to abandon a claim would be a good consideration if, on the facts being elicited and brought out, and on the decision of the court being obtained, it was found that the claim which was considered the consideration for the compromise was a bad one. But if the validity of a compromise is to depend upon whether the claim was a good one or not, no compromise would be effectual, because if it was afterwards disputed, it would be necessary to go into the question whether the claim was in fact a good one or not; and I consider, notwithstanding the doubt expressed by the Master of the Rolls, that the doctrine laid down in Cook *v.* Wright and Callisher *v.* Bischoffsheim and Ockford *v.* Barelli is the law of this court.

Now, was there here any claim in fact made on behalf of the company against Grant, and was there, in fact, anything which would bind the company to abandon that claim? The conclusion at which I have arrived is, that there is no evidence on which we ought to rely that there was in fact a claim intended to be made against Grant, and, in my opinion, on the evidence be fore us, we

ought not to arrive at the conclusion that there was ever intended to be any contract by the company, much less that there was in fact any contract binding the company that that claim should not be prosecuted, and should be given up. [His Lordship alluded shortly to the facts of the case, and continued:] Now, undoubtedly, on the evidence, several of the shareholders present at the general meeting of the 15th of March, 1883, expressed a very hostile feeling against Mr. Grant, who had sold the property to the company; that is admitted by him, and is in my opinion clear. But then what was done? There is nothing at all on the face of this letter of guarantee, as I have already stated, which says that it was given by Grant in consequence of the company giving up any claim they might have against him, and there is nothing whatever in the minutes of the board which states in fact that this was so, nor is there anything after that time in the minutes of the board of directors which can be referred to as showing an agreement by them to give up any claim they otherwise intended to prosecute against him. What I should say was the state of the case was this: there was angry feeling, and Mr. Grant thought it might result in proceedings being taken against him; and, therefore, what he considered the wisest course was to make this offer in the hope and expectation that he would keep things quiet, and let things go on peaceably.

Now, in my opinion a simple expectation, even though realized, would not be a good consideration for the promise which he gave. In order to make a good consideration for the promise there must be something binding done at the time by the other party, there must be something moving from the other party towards the person giving the promise. In my opinion to make a good consideration for this contract it must be shown that there was something which would bind the company not to institute proceedings, and shown also that in fact proceedings were intended on behalf of the company; and, in my opinion, I cannot come to the conclusion as a matter of fact that these two things existed. It is true that directors were present at the meeting, and that their guarantee was entered on the minutes, but although this was the case, it cannot in my opinion be considered that the directors by being there entered into any contract as directors not to enforce the claim of the company. The proper mode of proving any agreement made by the directors would be the production of evidence of its having been made at a meeting held by them as the persons having the conduct of the business of the society. No doubt they might, if they had been so minded, at a meeting of the board agree that they should not make any claim against him in consideration of this having taken place, but I find nothing of that kind.[1]

[1] A portion of the opinions in which the Statute of Frauds was held inapplicable and in which it was held that if the company had a valid claim that claim was entitled to priority over the plaintiff's claim, is omitted. Some other abbreviations of the

BENJAMIN B. STRONG, Appellant, *v.* LOUISA A. SHEFFIELD, Respondent

New York Court of Appeals, December 17, 1894–January 15, 1895

[*Reported in* 144 *New York,* 392]

Andrews, C. J. The contract between a maker or indorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is *nudum pactum.* The law governing commercial paper which precludes an inquiry into the consideration as against *bonâ fide* holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and indorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's indorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due

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case have been made. Fry, L. J. delivered a concurring, and Bowen, L. J. a dissenting opinion.

In America many courts have shown a disposition to follow the doctrine of the late English decisions. Union Bank *v.* Geary, 5 Pet. 99; Sheppey *v.* Stevens, 185 Fed. 147; Kress *v.* Moscowitz, 105 Ark. 638; Baldwin *v.* Central Bank, 17 Col. App. 7; *In re* Thomas, 85 Conn. 50; Morris *v.* Munroe, 30 Ga. 630; Hayes *v.* Massachusetts Co., 125 Ill. 625, 639; Ostrander *v.* Scott, 161 Ill. 339; Melcher *v.* Insurance Co., 97 Me. 512; Prout *v.* Pittsfield Fire District, 154 Mass. 450; Dunbar *v.* Dunbar, 180 Mass. 170; Layer *v.* Layer, 184 Mich. 663; Hansen *v.* Gaar, 63 Minn. 94; Kelley *v.* Hopkins, 108 Minn. 155; Majors *v.* Majors, 92 Neb. 473; Latulippe *v.* N. E. Inv. Co. 77 N. H. 31; Grandin *v.* Grandin, 49 N. J. L. 508; Post *v.* Thomas, 212 N. Y. 264; Di Iorio *v.* Di Brasio, 21 R. I. 208; Bellows *v.* Sowles, 55 Vt. 391; Citizens' Bank *v.* Babbitt, 71 Vt. 182; Hewett *v.* Currier, 63 Wis. 386.

The definition given in other cases seems to require the claim forborne to be at least reasonably doubtful in fact of law in order to make the forbearance or promise to forbear a good consideration. Stewart *v.* Bradford, 26 Ala. 410; Ware *v.* Morgan, 67 Ala. 461; Richardson *v.* Comstock, 21 Ark. 69; Russell *v.* Daniels, 5 Col. App 224; Mulholland *v.* Bartlett, 74 Ill. 58; Bates *v.* Sandy, 27 Ill. App. 552 (see later. Illinois cases *supra*); U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24; Sweitzer *v.* Heasly, 13 Ind. App. 567 (compare Moon *v.* Martin, 122 Ind. 211); Tucker *v.* Ronk, 42 Ia. 80; Peterson *v.* Breitag, 88 Ia. 418; (see Richardson Co. *v.* Hampton, 70 Ia. 573); Price *v.* First Nat. Bank, 62 Kan. 743; Cline *v.* Templeton, 78 Ky. 550; Mills *v.* O'Daniel, 62 S. W. Rep. 1123 (Ky.); Schroeder *v.* Fink, 60 Md. 436; Emmittsburg *v.* Donoghue, 67 Md. 383; Palfrey *v.* Portland, &c. R. R. Co., 4 Allen, 55. (See later Massachusetts cases, *supra*); Taylor *v.* Weeks, 88 N. W. Rep. 466 (Mich.); Foster *v.* Metts, 55 Miss. 77; Gunning *v.* Royal, 59 Miss. 45; Long *v.* Towl, 42 Mo. 545; Corbyn *v.* Brokmeyer, 84 Mo. App. 649; Kidder *v.* Blake, 45 N. H. 530; O. & C. R. R. Co. *v.* Potter, 5 Oreg. 228; Fleming *v.* Ramsey, 46 Pa. 252; Sutton *v.* Dudley, 193 Pa. 194; Warren *v.* Williamson, 8 Baxter, 427, McCloy *v.* Watkins, 88 Vt. 457; Nicholson *v.* Neary, 77 Wash. 294; Davisson *v.* Ford, 23 W. Va. 617.

is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. Morton *v.* Burn, 7 A. & E. 19; Wilby *v.* Elgee, L. R. 10 C. P. 497; King *v.* Upton, 4 Maine, 387; Leake on Con. p. 54; Am. Lead. Cas. vol. 2, p. 96 *et seq.* and cases cited.[1] The general rule is clearly, and in the main accurately, stated in the note to Forth *v.* Stanton (1 Saund. 210, note *b*). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. Oldershaw *v.* King, 2 H. & N. 517; Calkins *v.* Chandler, 36 Mich. 320.[2] The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. Merritt *v.* Todd, 23 N. Y. 28; Shutts *v.* Fingar, 100 id. 539.

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep

[1] Clegg *v.* Bromley, [1912] 3 K. B. 474; Edgerton *v.* Weaver, 105 Ill. 43; Newton *v.* Carson, 80 Ky. 309; Home Ins. Co. *v.* Watson, 59 N. Y. 390, *acc.*; Mecorney *v.* Stanley, 8 Cush. 85; Manter *v.* Churchill, 127 Mass. 31; Shupe *v.* Galbraith, 32 Pa. 10, *contra*. See also Shadburne *v.* Daly, 76 Cal. 355; Lambert *v.* Clewley, 80 Me. 480.

[2] Moore *v.* McKenney, 83 Me. 80; Haskell *v.* Tukesbury, 92 Me. 551; Howe *v.* Taggart, 133 Mass. 284; Glasscock *v.* Glasscock, 66 Mo. 627; Hockenbury *v.* Meyer, 34 N. J. L. 436; Elting *v.* Vanderlyn 4 Johns. 237; Traders' Nat. Bank *v.* Parker, 130 N. Y. 415; Citizens' Bank *v.* Babbitt, 71 Vt. 182, *acc.*

it until such time as I want it." Upon this alleged agreement the defendant indorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's indorsement, and that the trial court erred in refusing so to rule.

The order of the general Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation, with costs in all courts.

All concur, except Gray and Bartlett, JJ., not voting, and Haight, J., not sitting. *Ordered accordingly.*

LYNN and Another *v.* BRUCE

In the Common Pleas, July 1, 1794

[*Reported in* 2 *Henry Blackstone,* 317]

This was an action of assumpsit. The first count of the declaration was on a forbearance to sue on a bond given by the defendant to the plaintiffs for 200*l.* The second was as follows: "And whereas also, afterwards, &c., in consideration that the said Robert and Thomas (the plaintiffs), at the special instance and request of the said Charles (the defendant), had then and there consented and agreed to accept and receive of and from the said Charles a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and twopence, then due and owing from the said Charles to the said Robert and Thomas upon and by virtue of a certain other writing obligatory, bearing date, &c., made and executed by the said Charles to the said Robert and Thomas, whereby he became held and firmly bound to them in the sum of two hundred pounds, in full satisfaction and discharge of the said last-mentioned writing obligatory, and all moneys due thereon, he the said Charles undertook and then and there faithfully promised the said Robert and Thomas to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last-mentioned sum of one hundred

and five pounds five shillings and twopence, upon request; and the said Robert and Thomas in fact say that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last-mentioned sum of one hundred and five pounds five shillings and twopence, amounted to a large sum of money, to wit, the sum of seventy-three pounds thirteen shillings and sixpence, to wit, at Westminster aforesaid, whereof the said Charles afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, had notice and although the said Charles hath paid to the said Robert and Thomas a certain sum of money, to wit, the sum of seventy pounds and six shillings, part of the said last-mentioned sum of seventy-three pounds thirteen shillings and sixpence, the amount of the said last-mentioned composition, yet the said Charles not regarding, &c., hath not yet paid the sum of three pounds seven shillings and sixpence, being the residue of the said sum of seventy-three pounds thirteen shillings and sixpence, the composition last aforesaid, or any part thereof," &c.

A verdict having been found for the plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count; and after argument the opinion of the Court was thus delivered by

Lord C. J. Eyre. This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is that, in consideration that the plaintiff at the defendant's request had consented and agreed to accept and receive from the defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon 105*l.* 5*s.* 2*d.* due from the defendant to the plaintiff on a bond dated the 30th March, 1792, for 200*l.*, in full satisfaction and discharge of the bond and all money due thereon, the defendant promised to pay the said composition. It is then averred that the composition amounted to 73*l.* 13*s.* 6*d.*, and that the defendant had paid the plaintiff 70*l.* 6*s.*, part thereof. The breach is, that he did not pay 3*l.* 7*s.* 6*d.*, the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration; if it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of Allen *v.* Harris, 1 Lord Raym. 122, upon consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said that the books are so numerous that an accord ought to be executed, that it was impossible to overturn all the authorities: the expression is, "overthrow all the books." It was added that, if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled upon sound principles. *Interest reipublicæ ut sit finis litium:* accord executed

is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three of the cases in 1 Rol. Abr., tit. Accord, pl. 11, 12, 13, is because the plaintiff hath not any remedy for the whole, or where part has been performed, for that which is not performed, which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages for that part of the accord which has not been performed. But an accord must be so completely executed in all its parts before it can produce legal obligation or legal effect, that in Peytoe's Case, 9 Co. 79 *b*, it was holden that, where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in Cro. Eliz. 304, 305, to the same effect. It was argued according to the cases in Rol. Abr. that an accord executory in any part is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument, to say that no remedy lies for it for the plaintiff, because it is no bar; but put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.

NASH, *Administrator with the Will annexed of* JOHN BEATSON, *deceased, v.* ARMSTRONG

IN THE COMMON PLEAS, May 11, 1861

[*Reported in* 10 *Common Bench Reports, New Series,* 259]

THE declaration stated that, by deed dated the 29th of February, 1860, the said John Beatson let to the defendant certain rooms, part of a house of the said John Beatson, therein described, from the 1st of March in that year to the 24th of June in that year, at rent to be ascertained by two valuers, one on the part of the said John Beatson, and one on the part of the defendant, or an umpire to be agreed on by the said two valuers, and afterwards the said valuers were respectively accordingly duly appointed, but did not, without any default of the said John Beatson or the plaintiff in that behalf, ascertain the rent so to be paid as aforesaid, or appoint any umpire; and the defendant nevertheless, at his request, occupied the said rooms under the said demise until the 1st of September, 1860, the said John Beatson having previously died; that afterwards, and

whilst the amount of rent to be paid by the defendant for and in respect of his said occupation of the said rooms to the said 24th of June, and thence to the said 1st of September, was and remained unascertained, it was mutually agreed between the plaintiff as administrator as aforesaid and the defendant, that, if the plaintiff as administrator as aforesaid would not insist upon such valuation as aforesaid, the defendant would pay to the plaintiff as administrator for and in respect of his occupation of the said rooms under the said deed, and for and in respect of the said subsequent occupation thereof as tenant to the plaintiff as administrator as aforesaid, a reasonable sum in that behalf, to wit, the sum of 70*l.*; and that neither the plaintiff as administrator as aforesaid, nor the defendant, should ever call upon the other of them to carry out or perform or fulfil the terms of the said deed. Averment: that the plaintiff did every thing, and every thing existed and had before suit happened to entitle the plaintiff, as administrator as aforesaid, to payment of the said sum of money last mentioned, to wit, 70*l.* Breach: that no part thereof had been paid.

To this count the defendant demurred, the ground of demurrer stated in the margin being, "that a contract under seal cannot be varied or discharged by a parol agreement." Joinder.

R. G. Williams, in support of the demurrer.[1] There is no valid consideration for the promise stated in the declaration. [WILLIAMS, J. Why is it not a good consideration in assumpsit that the plaintiff foregoes his rights under the deed?] It is varying by parol the terms of a deed. [WILLIAMS, J. That is not so.] By the parol agreement, the defendant is to pay the rent ascertained in a way different from that provided by the deed. [WILLIAMS, J. The plaintiff is seeking to enforce an agreement founded upon a consideration that the plaintiff will not put in force his rights under the deed.] A deed can only be varied by a deed. Would a recovery in this action be pleadable in bar to an action upon the deed? [WILLES, J. I should have thought it a good answer by way of equitable plea. The payment of the 70*l.* under the agreement would surely be ground for an unconditional perpetual injunction against proceeding upon

[1] The points marked for argument on the part of the defendant were as follows: —

"1. That the plaintiff by the first count is seeking to recover upon a deed as varied by a parol agreement, whereas a deed can only be varied by a deed;

"2. That the alleged agreement could be carried out by deed only, and there is no allegation of the execution of any such deed;

"3. That the matters alleged in the first count disclose a claim which can be enforced only in equity, and not at law;

"4. That there is no consideration for the alleged agreement, if it is to be considered as independent of the deed;

"5. That the alleged agreement would afford no answer to an action upon the deed, or prevent the plaintiff from calling upon the valuers to appoint an umpire, or upon the defendant to carry out the terms of the deed, and the consideration for it is wholly nugatory;

"6. That the alleged agreement is in the nature of an accord only, and cannot be enforced or sued upon."

the deed.] The declaration, it is submitted, must be treated as it would have been before equitable pleas were known. Most of the cases upon this subject are cases where the parol agreement is set up as an answer to an action on the deed; but the grounds of the decision in White *v.* Parkin, 12 East, 578, are strongly in favor of the proposition contended for here.[1] . . . In the present case, it cannot be contended that the parol agreement does not conflict with the deed. There is an utter repugnance between the two instruments. In the course of the argument in White *v.* Parkin, a case of Leslie *v.* De la Torre was cited, where Lord Kenyon ruled that, the agreement by charter-party being under seal, the plaintiff could not set up a parol agreement inconsistent with it, and which in effect was meant in a certain extent to alter it. [WILLIAMS, J. The difficulty in your way is, that there is here an undertaking on the plaintiff's part to forbear from enforcing the payment of rent under the deed.] A rent would be payable under the deed, to which this agreement would be no answer. White *v.* Parkin[2] was cited and approved of in Thompson v. Brown, 7 Taunt, 656, 672.[3] . . . A deed cannot be varied in any way by parol; and no action can be maintained on a parol agreement which varies the deed. In the case of a contract for the sale of goods within the 17th section of the Statute of Frauds, where another day for payment has been by parol substituted for that originally fixed by the contract, it has been held that the subsequent parol agreement cannot be made the foundation of an action. Marshall *v.* Lynn, 6 M. & W. 109; Mechlen *v.* Wallace, 7 Ad. & E. 49, 2 N. & P. 224; Stead *v.* Dawber, 10 Ad. & E. 57. In Chitty on Contracts, 6th edit. 55, it is said: "If there be an entire consideration for the defendant's promise, made up of several particulars, and one of these consist of an agreement by the defendant which the Statute of Frauds requires to be in writing, and which for want of such writing is void, the whole consideration is void, and the promise cannot be supported." Here, there would be nothing to prevent the plaintiff from bringing an action upon the deed, even after the money was paid under the agreement. To allow this declaration to be good would be promoting circuity of action.

Raymond, for the plaintiff, was not called upon.[4]

[1] The learned counsel here stated that case.

[2] Leslie *v.* De la Torre?

[3] The learned counsel here stated the case of Gwynne *v.* Davy, 1 M. & G. 857, G. Scott, N. R. 29, 9 Dowl. P. C. 1.

[4] The points marked for argument on the part of the plaintiff were as follows: —

"1. That the contract disclosed by the first count does not infringe upon the rule that a contract under seal cannot be varied by parol agreement;

"2. That, although a contract under seal cannot be varied by parol, yet it is competent to the parties to enter into a fresh agreement by parol, and for a good consideration, not to put in force the original contract;

"3. That the contract declared on is collateral to that entered into by the deed, and leaves the force of the deed itself intact, and amounts merely to an agreement not to enforce the performance of the original contract under seal;

"4. That such new contract is founded upon a good consideration, and is therefore valid."

WILLIAMS, J. I am of opinion that there should be judgment for the plaintiff on this demurrer. I do not think it necessary to dispute the correctness of many of the doctrines contended for in the argument; for I do not consider that the conclusion we have arrived at in any degree conflicts with any of the rules of law adverted to. On the face of this declaration there is an admitted promise by the defendant to pay a certain sum of money at a stipulated time, and an admitted breach of that promise. That is a perfectly good promise if founded upon a sufficient legal consideration; and the simple question is, whether there is a sufficient legal consideration disclosed on the declaration. I am of opinion that there is. It appears upon the face of the declaration that the plaintiff, as the personal representative of the original contracting party, being in a condition to bring an action upon the original contract, or otherwise to put it in force, in consideration of his abstaining from enforcing the rights conferred on him by that contract, the defendant promised to pay in respect of the occupation of the premises under the deed referred to, and in respect of his subsequent occupation thereof as tenant to the plaintiff as administrator, a reasonable sum. It was not necessary, in order to make that a good consideration, that the mutual promises should amount to a release of the right of action flowing from the original contract. The plaintiff, having a right to enforce the benefits conferred on him by the contract, enters into an agreement not to do so, whereby he changes his situation to this extent, that, whereas before he had a right to sue upon the deed, if he now exercises that right he renders himself liable to an action. He has therefore plainly given a good consideration for the defendant's promise, and there is a complete cause of action disclosed on the face of the declaration. Upon principle, this is in truth nothing more than the ordinary case to be found in the old books, of an action against an heir whose ancestor has made a bond binding himself and his heirs, and who has assets by descent; if he contracts with the obligee of the bond that, if the latter will forbear to put the bond in suit, he will pay the sum secured by a given day, — that is a good assumpsit, and the forbearance till the day named is a good consideration to support the promise. The bond is not released by that. The only result is, to subject the obligee to an action if he puts the bond in suit before the expiration of the time agreed on. To that extent the terms of the bond are varied, and yet the bond remains unreleased; nevertheless, the consideration which flows from the agreement of the obligee not to put the bond in suit is good, and furnishes a ground of action if it be broken. That principle is applicable here.

WILLES, J. I am entirely of the same opinion. It appears to me that this declaration is neither open to the objection that it is an attempt to vary by parol the terms of a deed, nor to the objection that it is an action upon an accord.

Byles, J. I had at first some doubt whether the maxim *unumquodque dissolvitur eodem ligamine quo ligatur* was not applicable here; for, till satisfaction, the plaintiff might always have an action upon the deed, and one cannot but see that this would lead to circuity of action. Further, whatever may be the value of the decision in Leslie *v.* De la Torre, the reported observations of Lord Kenyon are very much in favor of Mr. Williams's argument. But Gwynne *v.* Davy is not so. Three of the judges there intimate an opinion that an action might be maintained on the parol agreement. And no other authorities have been cited to show that the rule is applicable to a cross-action, and is not confined to an action on the deed.

Keating, J. I concur with the rest of the Court in thinking that the declaration discloses a promise founded on a good consideration, and that it is not open to the objection that the plaintiff is seeking by parol to vary the terms of an instrument under seal.

Judgment for the plaintiff.

JOHN SCHWEIDER *v.* GEORGE LANG

Minnesota Supreme Court, July 3, 1882

[*Reported in* 29 *Minnesota,* 254]

Berry, J. On September 27, 1881, defendant, as payee, holding plaintiff's promissory note, upon which there was an unpaid balance of $1,850, falling due November 10, 1882, with interest to accrue, they agreed as follows: Defendant agreed to accept $1,750 in full satisfaction of the balance of principal and interest called for by the note; $150 to be paid by plaintiff within one week, and $1,600 within two weeks from said September 27; the note to be thereupon delivered up, and a mortgage securing the same to be cancelled. Plaintiff agreed to raise the $1,750 and pay the same to defendant as above specified. It was subsequently mutually agreed that defendant should call upon plaintiff at his residence, within a week from September 27, to receive the $150 payment, plaintiff to have the same there in readiness. Plaintiff had and kept the $150 in readiness during the week; but defendant failed to call for it at any time, and plaintiff was unable to find him during the week mentioned. Within two weeks from September 27, plaintiff, after much expense and trouble, procured the sum of $1,600, and on October 10, 1881, duly tendered the sum of $1,750 to the defendant in fulfilment of his (plaintiff's) agreement, and requested defendant to fulfil on his part. Defendant refused to receive the money or to perform his part of the agreement, having on October 1, without plaintiff's knowledge, sold and transferred the note and mortgage

to a third party, to whom plaintiff became thereby bound to pay the full unpaid amount called for by the note. Plaintiff brings this action for damages for defendant's breach of contract.

The agreement between the parties was not for the sale of the note and mortgage, but one by which the maker of these instrumnts was to be discharged from liability thereon by the payee. The agreement is, therefore, not within the statute of frauds, so as to be required to be in writing. The agreement is what is known as an accord executory; that is to say, it is an agreement upon the sum to be paid and received at a future day in satisfaction of the note. If the accord had been executed, there would have been a satisfaction extinguishing the note, the case being taken out of the rule by which payment of a part is held insufficient to satisfy the whole of a liquidated indebtedness by the fact that the payment was to be made before the indebtedness fell due. Sonnenberg *v.* Riedel, 16 Minn. 83; Brooks *v.* White, 2 Met. 283.

The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff — a case of mutual promises, one of which is the consideration of the other. The agreement was valid and binding upon both parties. The plaintiff has duly offered to perform on his part. The defendant has refused to accept the proffered performance, as also to perform on his part at plaintiff's request, and has moreover disabled himself from performing by disposing of the note. The plaintiff is, therefore, in accordance with the general rule which gives damages for breach of contract, entitled to recover the damages which have resulted to him from this breach by defendant. Billings *v.* Vanderbeck, 23 Barb. 546; Scott *v.* Frink, 53 Barb. 533; Very *v.* Levy, 13 How. 345. *Order affirmed.*

C. — Executed Consideration and Moral Consideration

RIGGS *v.* BULLINGHAM

In the Queen's Bench, Michaelmas Term, 1599

[*Reported in Croke Elizabeth*, 715]

Assumpsit. Whereas he was seised in fee of the advowson of Beckingham, in the county of Lincoln; in consideration that he at the defendant's request, by his deed, *dedisset et concessisset* to the defendant the first and next avoidance of the said church, the defendant, 22 August, 37 Eliz., assumed to pay to the plaintiff 100*l.*,

&c. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to an 100*l.* And after verdict it was moved in arrest of judgment that this consideration is past, and therefore not sufficient to ground an assumpsit; for there is not any time of the grant alleged; and it might have been divers years before the assumpsit made; and being a thing executed and past, no assumpsit afterwards can be good: and in proof thereof Dyer, 272, Hunt *v.* Bate was cited. But all the Court resolved to the contrary; for the grant being made at his request, it is a sufficient consideration, although it were divers years before; especially being to the defendant himself, the consideration shall be to continue. But if the grant had been to a stranger, and not at the defendant's request, it had peradventure been otherwise. . . . Wherefore it was adjudged for the plaintiff.

BOSDEN *v.* SIR JOHN THINNE

In the King's Bench, Michaelmas Term, 1603

[*Reported in Yelverton,* 40]

The plaintiff declared, *quod cum ad specialem instantiam* of the defendant, he had procured credit for one Flud for two pipes of wine amounting to 51*l.*, and Flud, *super credentiam* and *per medium* of the plaintiff at the request of the defendant, *emisset* of one Roberts two pipes of wine for 51*l.*, and *superinde* the plaintiff with Flud entered into bond of 100*l.* to Roberts for payment of the said 51*l.* at a day to come, which was not paid at the day; and thereupon Roberts sued the plaintiff upon the bond, and recovered, and had a *capias* against him, whereby he *fuit coactus* to pay Roberts 67*l.*, *de solutione* of which 67*l.* *causa prœallegata* he notified to the defendant, who *in consideratione prœmissorum* promised to pay the plaintiff the 67*l.* at Michaelmas; and showed the failure of payment of the 67*l.* at the day, &c. And upon *non assumpsit* pleaded, it was found against the defendant. And *Yelverton* moved in arrest of judgment, that the action upon the matter shown does not lie, because the consideration was past and executed before the promise, and the defendant had no profit by it, but all the benefit was to Flud, a stranger; like the case 10 Eliz., Dy. 272, where J. S. was bail for the servant upon an arrest, and signified all to the master after the bail entered into, who promised to save him harmless; and although the bail was condemned, yet no assumpsit lay against the master, because the consideration was past before the promise: and it seems that upon the first request only to give credit to Flud for two pipes of wine, no assumpsit lies; for a bare request does not imply any promise; as if I say to a merchant, I pray trust J. S. with 100*l.*, and he does so, this is of his own head,

and he shall not charge me, unless I say I will see you paid or the like. And it seems likewise that the promise shall not have relation to the first request of giving credit to Flud, because the entreaty for the credit was but for two pipes of wine amounting to 51*l.*, and the promise is for 67*l.*, and so they differ in the sums; as if I request J. S. to enter into bond for J. D. for 10*l.*, and I will see him paid; now if J. S. enters into bond of 20*l.* for the payment of 10*l.* for J. D., which 20*l.* is recovered against him, he shall not charge me on my promise but 10*l.* But *non allocatur per* FENNER, GAWDY, and POPHAM; for although upon the first request only assumpsit does not lie, yet the promise coming after shall have reference to the first request; and although the request was but for two pipes of wine amounting to 51*l.*, that Flud might have credit for that; yet when Roberts, who sold the wine, would not take (as appears) security but by bond of 100*l.* for payment of 51*l.*, and all this matter is signified afterwards to the defendant, who agrees to it, and promises to pay the 67*l.*, this shall charge him; because it has its essence and commencement from the first request made by the defendant. As (*per* GAWDY) if I request one to marry my cousin, who does so, and afterwards tells me of it, and thereupon I promise him 100*l.*, this is a good promise to charge me, although the marriage was past, which is the consideration; because now the promise shall have reference to the request, which was before the marriage. *Vide* this case, Dy. 272 *b*. The same law (by him) if I entreat one to be bail for my servant, and he thereupon becomes bail, and is condemned, and afterwards tells me of it, and I promise him to save him harmless, it is good, and he shall recover his damage *in toto*. Wherefore judgment was given for the plaintiff. But YELVERTON, J., was *contra* clearly.[1]

ROSCORLA *v.* THOMAS

IN THE QUEEN'S BENCH, May 30, 1842

[*Reported in* 3 *Queen's Bench Reports*, 234]

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit, &c., in consideration that plaintiff at the request of defendant had bought of defendant a certain horse, at and for a certain price, &c., to wit, &c., defendant promised plaintiff that the horse did not exceed five years old, and was sound, &c., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse at the time of the making of the said promise was not

[1] Lampleigh *v.* Brathwait, Hobart, 105, and other decisions, *acc.* See Langdell, Summary of Contracts, §§ 92–94.

free from vice; but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby, &c.

Pleas. 1. *Non assumpsit.* Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable, or ferocious, in manner, &c.; conclusion to the country. Issue thereon.

On the trial, before Wightman, J., at the Cornwall Spring Assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter Term, 1841, *Bompas,* Serjt., obtained a rule *nisi* for arresting the judgment on the first count. In last Term

Erle and *Butt* shewed cause. The objection is, that the first count states only a *nudum pactum.* But there is an executed consideration, which with a request will support a promise. Now the request need not be express; wherever the law will raise a promise, a request by the party promising will be implied; note (*c*) to Osborne *v.* Rogers.[1] Payne *v.* Wilson was the converse of the present case: there a consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is practically executory because the sale and warranty would be coincident. In Thornton *v.* Jenyns[2] the declaration charged that, in consideration that plaintiff had promised to defendant, defendant then promised plaintiff. It was objected that this was an executed consideration without a request, which was insufficient where the law would not raise a promise; and Brown *v.* Crump[3] was cited; but the Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained.[4]

Bompas, Serjt., and *Slade,* contra. The warranty ought to be given at the time of the sale: if made after, it is without consideration. 3 Blackst. Com. 166; Com. Dig., Action upon the Case for a Deceipt (A. 11); Roswel *v.* Vaughan,[5] Pope *v.* Lewyns.[6] Thornton *v.* Jenyns was a case of mutual promises, which can never literally be made at the same moment: here the declaration definitely lays the perfect sale as antecedent to and distinct from the warranty. And the warranty is a matter not implied by the law upon a sale. Parkinson *v.* Lee.[7] Even an express promise without a legal consideration is invalid. Collins *v.* Godfroy.[8] In Hopkins *v.* Logan there was an executed consideration from which a promise to pay on request would have arisen; and it was holden that this did not support a promise to pay on a future day named. [Patteson, J., referred to Hunt *v.* Bate, as cited in Eastwood *v.* Kenyon, and to Lampleigh *v.* Brathwait.] *Cur. adv. vult.*

[1] 1 Wms. Saund. 264 *a.* [2] 1 Man. & G. 166. [3] 1 Marsh. 567

[4] It was also argued that the warranty might here, after verdict, be taken to be coincident with the sale: to which it was answered that if it were so, the evidence negatived the declaration.

[5] Cro. Jac. 196. [6] Cro. Jac. 630. [7] 2 East. 314. [8] 1 B. & Ad. 950.

Lord Denman, C. J., in this Term (May 30) delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff at the request of the defendant had bought of the defendant a horse for the sum of 30*l.*, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coëxtensive with the consideration. In the present case, the only promise that would result from the consideration as stated, and be coëxtensive with it, would be to deliver the horse upon request. The precedent sale without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear therefore that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note (*a*) to Wennall *v.* Adney,[1] and in the case of Eastwood *v.* Kenyon. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law subsequently revived, and of equitable and moral obligations which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute. *Rule absolute.*[2]

[1] 3 Bos. & Pul. 249.

[2] "In Lampleigh *v.* Brathwait, it was assumed that the journeys which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract; the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such request would have raised a promise by implication

JOSEPHINE L. MOORE *v.* NELSON L. ELMER AND ANOTHER, ADMINISTRATORS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, September 24–October 18, 1901

[*Reported in* 180 *Massachusetts,* 15]

BILL OF EQUITY by the owner of certain land subject to a mortgage assumed by her, to restrain the administrators of Willard Elmer, the holders of the mortgage, from foreclosing it, or disposing of it and the note secured thereby, and for an order to the defendants to discharge the mortgage and cancel the note, filed July 7, 1900.

The bill alleged that the plaintiff was the owner of a tract of land to which she derived title by a deed of one Herman E. Bogardus, by which deed she assumed and agreed to pay a certain mortgage of the premises given by Bogardus, which mortgage and the note for $1,300 thereby secured had been assigned to Willard Elmer, the defendants' intestate, that the defendants' intestate on or about January 11, 1898, executed and delivered to the plaintiff the following agreement: "Springfield, Mass., Jan. 11, 1898. In Consideration of Business and Test Sittings Reseived from Mme. Sesemore, the Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I the undersigned do hear by agree to give the above named Josephene or her heirs, if she is not alive, the Balance of her Mortgage note whitch is the Herman E. Bogardus Mortgage note of Jan. 5, 1893, and the Interest on same on or after the last day of Jan. 1900, if my Death occurs before then whitch she has this day Predicted and Claims to be the truth, and whitch I the undersighned Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death Occurs before 1900. Willard Elmer."

The bill alleged, that by the foregoing instrument the premises were released and discharged from the operation of the mortgage deed, and the note secured thereby was paid in full and became null and void, upon the death of Willard Elmer, which occurred before the year 1900, to wit, on September 15, 1899.

The bill also alleged, that before the execution of the above agreement, at the request of Willard Elmer, the plaintiff gave to Elmer the business and test sittings referred to in the agreement as the consideration for the agreement, and at his request devoted much time and labor thereto.

The defendants demurred, and among the causes of demurrer alleged, that the above agreement annexed to the bill was a wager-

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to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount." — Erle, C. J., Kennedy *v.* Broun, 13 C. B. N. S. 677, 740. See also Stewart *v.* Casey, [1892] 1 Ch. 104, 115.

ing contract and against public policy and void, and that it was without consideration.

In the Superior Court the case was heard by LAWTON, J., who made a decree sustaining the demurrer and dismissing the bill. The plaintiff appealed and, at the request of the plaintiff, the judge reported the case for the determination of this court. If the demurrer was sustained rightly, the bill was to be dismissed; otherwise, the demurrer was to be overruled and the defendants were to answer to the plaintiff's bill.

W. H. McClintock (*J. B. Carroll* with him) for the plaintiff.

C. W. Bosworth, for the defendants.

HOLMES, C. J. It is hard to take any view of the supposed contract in which, if it were made upon consideration, it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown. If, as we must assume and as the writing seems to imply, there was no such understanding, the consideration was executed and would not support a promise made at a later time. The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for. See Langdell, Contracts, §§ 92 *et seq.;* Chamberlin *v.* Whitford, 102 Mass. 448, 450; Dearborn *v.* Bowman, 3 Met. 155, 158; Johnson *v.* Kimball, 172 Mass. 398, 400.

It may be added that even if Elmer was under a previous liability to the plaintiff it is not alleged that the agreement sued upon was received in satisfaction of it, either absolutely or conditionally, and this again cannot be implied in favor of the plaintiff's bill. It is not necessary to consider what further difficulties there might be in the way of granting relief. *Bill dismissed.*[1]

[1] In the following cases a subsequent promise was held ineffectual. Walker *v.* Brown, 104 Ga. 357; Allen *v.* Bryson, 67 Ia. 591; Walker *v.* Irwin, 94 Ia. 448; Holloway *v.* Rudy, 60 S. W. Rep. 650 (Ky.); Cleaver *v.* Lenhart, 182 Pa. 285; Valentine *v.* Bell, 66 Vt. 280; Stoneburner *v.* Motley, 95 Va. 784, *acc.* See also Bailey *v.* Bussing, 29 Conn. 1; Marsh *v.* Chown, 104 Ia. 556; Beaty *v.* Carr, 109 Ia. 183; Stout *v.* Humphrey, 69 N. J. L. 532; Shepard *v.* Rhodes, 7 R. I. 470.

The new promise was enforced in Bradford *v.* Roulston, 8 Ir. C. L. 468; Lonsdale *v.* Brown, 4 Wash. C. C. 148, 150; Friedman *v.* Suttle, 10 Ariz. 57; Winefield *v.* Feder, 169 Ill. App. 480; Daily *v.* Minnick, 117 Ia. 563; Viley *v.* Pettit, 96 Ky. 578; Pool *v.* Horner, 64 Md. 131; Stuht *v.* Sweesy, 48 Neb. 767; Wilson *v.* Edmonds, 24 N. H. 502; Hicks *v.* Burhans, 10 Johns. 243; Oatfield *v.* Waring, 14 Johns. 188; Greeves *v.* M'Allister, 2 Binn. 592; Landis *v.* Royer, 59 Pa. 95; Sutch's Estate, 201 Pa. 305; Silverthorn *v.* Wylie, 96 Wis. 69; Raife *v.* Gorrell, 105 Wis. 636. See also Carson *v.* Clark, 2 Ill. 113; Montgomery *v.* Downey, 88 N. W. Rep. 810 (Ia.); Freeman *v.* Robinson, 38 N. J. L. 383; Chaffee *v.* Thomas, 7 Cow. 358; Comstock *v.* Smith, 7 Johns. 87; Boothe *v.* Fitzpatrick, 36 Vt. 681; Seymour *v.* Marlboro, 40 Vt. 171.

EDMONDS' CASE

In the Common Pleas, Michaelmas Term, 1586

[*Reported in* 3 *Leonard,* 164]

In an action upon the case against Edmonds, the case was, that the defendant, being within age, requested the plaintiff to be bounden for him to another for the payment of 30*l.*, which he was to borrow for his own use to which the plaintiff agreed, and was bounden, *ut supra.* Afterwards the plaintiff was sued for the said debt, and paid it. And afterwards, when the defendant came of full age, the plaintiff put him in mind of the matter aforesaid, and prayed that he might not be damnified so to pay 30*l.*, it being the defendant's debt: whereupon the defendant promised to pay the debt again to the plaintiff: upon which promise the action was brought. And it was holden by the Court that, although here was no present consideration upon which the assumpsit could arise, yet the court was clear that upon the whole matter the action did lie; and judgment was given for the plaintiff.[1]

WATSON *v.* TURNER et al

In the Exchequer, Trinity Term, 1767

[*Reported in Buller's Nisi Prius,* 129]

An action was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him by the defendant Turner, who was the only acting overseer of the parish. The pauper was suddenly taken ill, and her son called in the plaintiff, who had attended her for four months, and cured her. After the cure Turner was applied to, and promised to pay the plaintiff's bill. It was held, that though there was no precedent request from the overseers, yet the promise was good, notwithstanding the Statute of Frauds; for overseers are under a moral obligation to provide for the poor. Secondly, that as Turner was the only acting overseer, the other was bound by his promise.[2]

[1] In the report of the same case in Godb. 138, *nom.* Barton and Edmonds' Case, it is said: "But if a *feme covert* and another at her request had been bounden in such a bond, and after the death of her husband she had assumed to have saved the other harmless against such bond, such assumpsit should not have bound the wife." For cases in accord with Edmonds' Case see 1 Williston, Contracts, § 239.

[2] See Paynter *v.* Williams, 1 Cr. & M. 810.

ATKINS et Uxor *v.* HILL

In the King's Bench, Easter Term, 1775

[*Reported in Cowper,* 284]

In assumpsit the plaintiffs declared against Charles Hill, being in the custody, &c.: For that whereas James Clarke, &c., by his last will, &., did give and bequeath to the plaintiff's wife the sum of 60*l.*, &c., and of his last will and testament made the said Charles Hill sole executor, &c., and the said Charles Hill took upon himself the burthen and execution of the said will: And the said N. and A. further say that divers goods and chattels, &c., afterwards, &c., came to the hands of the said Charles Hill as executor of the said J. C., which said goods and chattels were more than sufficient to satisfy and pay all the just debts and legacies of the said J. C., &c., of which the said C. H. then and there had notice: By reason of which said premises, the said Charles Hill became liable to pay to the said N. and A. the said sum of 60*l.*; and, being so liable, he, the said C., in consideration thereof, afterwards, &c., undertook and faithfully promised to pay to them the said sum of 60*l.*, whenever, &c.

To this declaration the defendant demurred generally.

Mr. *Le Blanc,* in support of the demurrer.[1]

Mr. *Buller,* contra, for the plaintiff. The question is, whether the facts stated in this declaration, namely, that the defendant was executor and had assets, &c., are a sufficient consideration for a promise. As to that question, it is a settled point that, wherever an express promise is made upon a good consideration, an action lies. And the slightest ground is sufficient to maintain a promise. 1 Vent. 40, 41, Wells *v.* Wells; 1 Lev. 273, s. c.; Stone *v.* Withipool, Latch, 21, in which latter case it is laid down, "that it is an usual allegation for a rule, that any thing which is a ground for equity is a sufficient consideration."

But here an express promise is made, and by the demurrer admitted. It is objected, however, that there is no averment that the funeral expenses are paid. The answer is, it is averred that he had assets to pay, which is alone sufficient, and so it was expressly held by Lord King, in the case of Camden *v.* Turner, Sittings after Tr., 5 Geo. I., C. B.; Select Cases of Evidence by Sir John Strange.

Lord Mansfield. This is a case in which the declaration particularly states that assets have been received by the defendant, the executor, more than sufficient to pay all the testator's debts and legacies. If so, it most undoubtedly must be taken upon the pleadings that there was sufficient to discharge the funeral expenses, because they are payable first; consequently, if there was less than the amount of them, there could not be sufficient to discharge the debts and leg-

[1] Only so much of the arguments and decision is here given as relates to the question of "Consideration."

acies. The declaration then goes on to state that, in consideration of there being full sufficient assets as aforesaid, the defendant undertook and promised to pay the plaintiff his legacy. No doubt then but, at any time after an executor has assented, the property vests; and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly, upon a bill being filed in chancery against an executor, one part of the prayer of it was, that he should assent to the bequests in his testator's will. If he had assets, he was bound to assent. And when he had assented, the legacy became a demand which in law and conscience he was liable to pay. But, in the present case, there is not only an assent to the legacy, but an actual promise and undertaking to pay it; and that promise founded on a good consideration in law, as appears from the cases cited by Mr. Buller, particularly the case of Camden *v.* Turner,[1] where acknowledgment by an executor, "that he had enough to pay," was held a sufficient ground to support an assumpsit. Here the defendant, by his demurrer, admits he had sufficient to pay; therefore this is not the case that Mr. Le Blanc has been arguing upon; but it is the case of a promise made upon a good and valuable consideration, which, in all cases, is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay. For instance, where an infant contracts debts during his minority; if after he comes of age he consents to pay them, an action lies. So a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. Co. Lit., Attornment, 315 *a*. In this case the promise is grounded upon a reasonable and conscientious consideration; namely, that the defendant had assets to discharge the legacy. If so, he was compellable in a court of equity, or in the ecclesiastical court, to pay it. I give my opinion upon this case as it stands; that is, that it is an express promise made upon a good and sufficient consideration.

The three other judges concurred.

Per Cur. Judgment for the plaintiff.[2]

Mr. *Le Blanc* then moved for liberty to withdraw the demurrer, and plead the general issue; but the Court refused it.

[1] Sittings after Trinity Term, 5 Geo. I., C. B., *coram* King, C. J.

[2] Hawkes *v.* Saunders, Cowp. 289, *acc.* But see Smith *v.* Carroll, 112 Pa. 390; Dunham *v.* Elford, 13 Rich. Eq. 190.

TRUEMAN *v.* FENTON

In the King's Bench, January 28, 1777

[*Reported in Cowper,* 544]

This was an action on a promissory note, bearing date the 11th February, 1775, payable to one Joseph Trueman (the plaintiff's brother), three months after date, for 67*l.*, and indorsed by him to the plaintiff.

The declaration contained other counts for goods sold, money had and received, and on an account stated. The defendant pleaded, first, *non assumpsit;* secondly, "that on the 19th January, 1775, he became bankrupt, and that the debt for which the said note was given was due to the plaintiff before such time as he, the defendant, became bankrupt, and that the note was given to Joseph Trueman for the use of, and for securing, the said plaintiff his debt so due." The cause was tried before Lord Mansfield at the Sittings after Michaelmas Term, 1776, when the jury found a verdict for the plaintiff, damages 72*l.* 12*s.*, costs 40*s.*, subject to the opinion of the Court upon a special case, stating the answer of the plaintiff in this action to a bill filed against him in the Exchequer by the present defendant for a discovery of the consideration of the note; the substance of which was as follows: "That on the 15th of December, 1774, the defendant, Fenton, purchased a quantity of linen of the plaintiff, Trueman; and it being usual to abate 5*l.* per cent to persons of the defendant's trade, the price, after such abatement made, amounted to 126*l.* 18*s.* That at the time of the sale it was agreed that one-half of the purchase-money should be paid at the end of six weeks, and the other half at the end of two months: And in consideration thereof, the plaintiff, Trueman, drew two notes on the defendant for 63*l.* 9*s.* each, payable to his own order, at six weeks and two months respectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a discharge for the sum. He then denied that he had proved or claimed any debt or sum of money under the commission; but set forth that he acquainted the defendant he was surprised at his ungenerous behavior in purchasing so large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes: upon which the defendant pressed him to take up the two notes, and proposed to give him a security for part of the debt. That afterwards, on the 11th February, 1775, the defendant called upon the plaintiff, and voluntarily proposed to secure to him the payment of 67*l.* in satisfaction of his debt, if he would take up the two notes and cancel or deliver them up to the defendant. That the plaintiff agreed to accept this proposal with the approbation of his attorney, and desired the note to be made payable to his brother, Joseph Trueman, or order, three months after date. That he took up the two ac-

ceptances and delivered them to the defendant to be cancelled, and accepted the above note for 67*l.* in satisfaction and discharge thereof. That a commission of bankruptcy issued against the defendant on the 19th of January, 1775, and that the bankrupt obtained his certificate on the 17th of April following." The question reserved was, Whether the facts above stated supported the merits of the defendant's plea? If they did not, then a verdict was to be entered for the plaintiff on the general issue; but if the merits of the second plea supported the defendant's case, then a verdict was to be entered for the defendant on that plea.

Mr. *Buller,* for the plaintiff.

Mr. *Davenport,* contra.

Lord Mansfield. The plea put in, in this case, is that the debt was due at the time of the act of bankruptcy committed; and on that plea, in point of form, there was a strong objection made at the trial that the allegation was not strictly true; because at the time of the sale, credit was given to a future day; which day, as it appeared in evidence, was subsequent to the act of bankruptcy committed. To be sure, on the form of the plea, the defendant must fail. But I never like to entangle justice in matters of form, and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and destruction of both. I put it therefore to the counsel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the Court, whether, according to the facts and truth of the case, the defendant could have pleaded his certificate in bar of the debt in question; and in case they had refused to do so, I should have left it to the jury upon the merits. The counsel for the plaintiff very properly gave up the point of form. The question, therefore, upon the case reserved, is worded thus: Whether the facts support the merits of the defendant's plea? That is, Whether, on the merits of the case, properly pleaded, the certificate of the defendant would have been a bar to the plaintiff's action? Now, in this case there is no fraud, no oppression, no scheme whatsoever on the part of the plaintiff to deceive or impose on the defendant; and as to collusion with respect to the certificate, where a creditor exacts terms of his debtor as the consideration for signing his certificate, and obtains money or a part of his debt for so doing, the assignees may recover it back in an action. But that is not the case here. So far from it, the transaction itself excluded the plaintiff from having any thing to do with the certificate. No man can vote for or against the certificate till he has proved his debt. Here the plaintiff delivers up the two drafts bearing date prior to the act of bankruptcy, and by agreement accepts one for little more than half their amount, bearing date after the commission of bankruptcy sued out. Most clearly, therefore, he could not have proved that note under the commissions; and if not, he could have nothing to do with the certificate. That brings it to the

general question, Whether a bankrupt, after a commission of bankruptcy sued out, may not, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promise, it must be founded upon the ground of its being *nudum pactum*. As to that, all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. How far have the courts of equity gone upon these principles? Where a man devises his estate for payment of his debts, a court of equity says (and a court of law in a case properly before them would say the same): All debts barred by the Statute of Limitations shall come in and share the benefit of the devise, because they are due in conscience. Therefore, though barred by law, they shall be held to be revived and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the Statute of Limitations, is very true. The slightest acknowledgment has been held sufficient; as saying, "Prove your debt, and I will pay you," — "I am ready to account, but nothing is due to you." And much slighter acknowledgments than these will take a debt out of the statute. So in the case of a man, who after he comes of age promises to pay for goods or other things, which during his minority one cannot say he has contracted for, because the law disables him from making any such contract, but which he has been fairly and honestly supplied with, and which were not merely to feed his extravagance, but reasonable for him (under his circumstances) to have; such promise shall be binding upon him, and make his former undertaking good. Let us see then what the transaction is in the present case. The bankrupt appears to me to have defrauded the plaintiff by drawing him in, on the eve of a bankruptcy, to sell him such a quantity of goods on credit. It was grossly dishonest in him to contract such a debt, at a time when he must have known of his own insolvency, and which it is clear the plaintiff had not the smallest suspicion of, or he would not have given credit and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquishes all hope or chance of benefit from a dividend under the commission, by forbearing to prove his debt; gives up the securities he had received from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full satisfaction of his whole demand. Is that against conscience? Is it not on the contrary a fair consideration for the note in question? He might foresee prospects from the way of life the bankrupt was

in, which might enable him to recover this part of his debt, and he takes his chance; for till then he could get nothing by the mere imprisonment of his person. He uses no threats, no menace, no oppression, no undue influence; but the proposal first moves from, and is the bankrupt's own voluntary request. The single question then is, Whether it is possible for the bankrupt, in part or for the whole, to revive the old debt? As to that, Mr. Justice Aston has suggested to me the authority of Bailey *v.* Dillon, where the Court would not hold to special bail, but thought reviving the old debt was a good consideration. The two cases cited by Mr. Buller are very material. Lewis *v.* Chase, 1 P. Wms. 620, is much stronger than this; for that smelt of the certificate; and the Lord Chancellor's reasoning goes fully to the present question. Then the case of Barnardiston *v.* Coupland, in C. B., is in point. Lord Chief Justice Willes there says, "that the revival of an old debt is a sufficient consideration." That determines the whole case. Therefore I am of opinion that, if the plea put in had been formally pleaded, the merits of the case would not have been sufficient to bar the plaintiff's demand.

Aston, J. As a case of conscience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waives his right to come in under the commission, it is a benefit to the rest of the creditors. In the case of Bailey *v.* Dillon, the Court on the last day of the Term were of opinion. "that the defendant could not be held to special bail, yet they would not say that he might [not?] revive the old debt which was clearly due in conscience." A bankrupt may be and is held to be discharged by his certificate from all debts due at the time of the commission; but still he may make himself liable by a new promise. If he could not, the provision in the Stat. 5 Geo. II., c. 30, sect. 11, by which every security for the payment of any debt due before the party became bankrupt, as a consideration to a creditor to sign his certificate, is made void, would be totally nugatory.— Lord Mansfield added that this observation was extremely forcible and strong. *Per Cur. Judgment for the plaintiff.*[1]

GRANT *v.* PORTER

New Hampshire Supreme Court, June, 1884

[*Reported in* 63 *New Hampshire,* 229]

Allen, J. The plaintiff and the other creditors of Porter Brothers (of which firm the defendant is sued as surviving partner) each accepted an offer of forty-five *per centum* of his claim in full settle-

[1] The cases on promises to pay debts discharged by bankruptcy are collected in 1 Williston, Contracts, § 158.

ment, and Hodgdon, who received all the debtors' property for the purpose of paying the amount agreed upon as a compromise and obtaining from the creditors a discharge of the indebtedness, gave each creditor a note or forty-five *per centum* of his claim, and at the same time took an assignment from each, under seal, of his demand and of the right to prosecute it to final judgment. These notes, including the plaintiff's, were subsequently paid by Hodgdon, and Porter Brothers gave the plaintiff the note in suit for the balance of his demand.

Ordinarily, payment and acceptance of a smaller sum for a larger one due is no discharge of the larger. Blanchard *v.* Noyes, 3 N. H. 519; Mathewson *v.* Bank, 45 N. H. 104, 107. But payment by a third person at the request of the debtor, either in money or by a note, accepted by the creditor in full satisfaction and discharge of the debt, is an exception to the rule, and extinguishes the debt. Brooks *v.* White, 2 Met. 283. The assignee of the defendant's firm received their property for the express purpose and on the express consideration of obtaining a discharge of their indebtedness by the payment of forty-five *per centum* of the same; and when the plaintiff accepted from the assignee that sum in full satisfaction, his demand against the defendant was extinguished. His debt being satisfied and extinguished, there was no consideration for the note in suit. It is not the case of a debt discharged by the order of a court in bankruptcy proceedings. In a case of that kind a new promise to pay the debt, made after discharge, revives the debt which is not extinguished by the discharge, and the consideration for the original demand is a good consideration for a new promise. Bank *v.* Wood, 59 N. H. 407; Wiggin *v.* Hodgdon, 63 N. H. 39.

The assignment of the plaintiff's demand to the assignee was in writing, under seal; and if, as the plaintiff claims, this was only formal and intended as a receipt to the defendant and a voucher for the assignee, it was certainly a valid as well as formal transfer of the claim, with all rights of action upon it, to the assignee. The plaintiff, having parted with all interest in the claim and all right of action upon it, nothing remained to him which could be treated as a consideration for the note in suit, and there can be no recovery upon it. *Judgment for the defendant.*

CARPENTER, J., did not sit: the others concurred.[1]

[1] *Ex parte* Hall, 1 Deacon, 171; Samuel *v.* Fairgrieve, 21 Ont. App. 418; Rasmussen *v.* State Bank, 11 Col. 301; Lewis *v.* Simons, 1 Handy, 82; Callahan *v.* Ackley 9 Phila. 99, *acc.* Similarly in case of a voluntary release or accord and satisfaction. Warren *v.* Whitney, 24 Me. 561; Phelps *v.* Dennett, 57 Me. 491; Ingersoll *v.* Martin, 58 Md. 67; Hall *v.* Rice, 124 Mass. 292; Manson *v.* Campbell, 27 Minn. 54; Zoebisch *v.* Von Minden, 47 Hun, 213 (see s. c. 120 N. Y. 406); Snevily *v.* Read, 9 Watts, 396; Shepard *v.* Rhodes, 7 R. I. 470; Taylor *v.* Skiles, 113 Tenn. 288. But see Jamison *v.* Ludlow, 3 La. Ann. 492; Willing *v.* Peters, 12 S. & R. 177, *contra.* Compare *Re* Merriman, 44 Conn. 587; Higgins *v.* Dale, 28 Minn. 126.

BARNES, DOWDING, AND BARTLEY, *v.* HEDLEY AND CONWAY

IN THE COMMON PLEAS, November 24, 1809.

[*Reported in* 2 *Taunton,* 184]

THIS was an issue between the plaintiffs, who were the executors of William Webb, deceased, and the defendants, who were assignees under a commission of bankruptcy which issued against William Harrè and Henry Suthmier, directed by order of the Lord Chancellor, in order to try whether the bankrupts on the 13th of August, 1802, were indebted to Webb in any and what sum of money. The trial came on at the Sittings in London, Mich. Term, 1808, before Mansfield, C. J., when a verdict was found for the plaintiffs for the sum of 11,672*l.* 4*s.* 2*d.* subject to the opinion of the Court on the following case: By a written agreement made on the 15th of May, 1800, between Webb and the bankrupts, the former agreed to advance money from time to time upon interest at 5 per cent. to Harrè and Suthmier, who carried on the business of sugar bakers in copartnership, in order to enable them to purchase raw sugars; and in consideration of such advances the bankrupts were also to pay to Webb a commission of 5 per cent. for all sugars which were to be bought of him, or provided for Messrs. Harrè and Suthmier; and in order to secure to Webb the balance which might become due to him on these transactions, Harrè and Suthmier executed and gave to him certain deeds and securities. Webb made out four several successive half-yearly accounts between him and Harrè and Suthmier, on the footing of this agreement, and various sums of money were paid to Webb on these accounts from time to time by the bankrupts; these accounts closed on the 10th of August, 1802, when a considerable balance was due from the bankrupts to Webb. These accounts comprised the principal moneys actually advanced, and interest at 5 per cent.; and also 5 per cent. on all sugars purchased by the bankrupts. Webb never purchased or procured any sugars for the bankrupts; but the same were always purchased by the bankrupts themselves in their own names. It was admitted on the trial that the original agreement of the 15th of May, 1800, was illegal and usurious, and that no part of the balance could have been recovered by Webb from Harrè and Suthmier, if they had set up the usury; and Webb was informed by the attorney of Harrè and Suthmier in July, 1802, that these transactions were usurious, and that his whole debt was in danger of being lost, and a writ of *latitat* was actually sued out by the bankrupts' attorneys upon the Statute of Usury; but this fact was unknown to Webb. In consequence of this intimation, it was agreed between Harrè and Suthmier and Webb, that Webb should make out fresh accounts, leaving out all the charges for commission; and should only charge them with the principal

money, together with legal interest; and that the original deeds and articles in the possession of Webb should be given up by him and cancelled accordingly. Webb accordingly made out such fresh account, in which he omitted the whole charge for commission; and the balance due to him amounted to the sum of 11,672*l.* 4*s.* 2*d.*, which balance was composed of principal moneys actually advanced under the agreement of 15th May, 1800, and of interest at 5 per cent. fairly and legally calculated; the whole commission and every objectionable charge being omitted. This account, so corrected, was, on the 12th of August, 1802, delivered to the agent of Harrè and Suthmier, and on the following day they acknowledged this balance to be due to Webb, and promised to pay the same; whereupon the deeds and securities executed to Webb by Harrè and Suthmier, when the original agreement was entered into, were produced by Webb or his agent, in the presence of Harrè and Suthmier, and were then cancelled and burnt. The question for the opinion of the Court was, whether, under the circumstances of this case, the plaintiffs were entitled to recover the above balance of 11,672*l.* 4*s.* 2*d.* If the Court should be of that opinion, a verdict for such sum was to be entered for the plaintiffs; if otherwise, the verdict to be entered for the defendants.

This cause was twice argued: first, in Easter Term, 1809, by *Best,* Serjt., for the plaintiffs, and *Vaughan,* Serjt., for the defendants; and again in Trinity Term, 1809, by *Shepherd,* Serjt., for the plaintiffs, and *Lens,* Serjt., for the defendants.

In the course of the present Term the judges of the court sent to the Lord Chancellor the following certificate of their opinion:—

"This case has been argued before us by counsel, and we are of opinion that under the circumstances the plaintiffs are entitled to recover the above balance of 11,672*l.* 4*s.* 2*d.*" [1]

LEE *v.* MUGGERIDGE and Another, *Executors of* Mary Muggeridge, *deceased*

In the Common Pleas, Trinity Term, June 29, 1813

[*Reported in* 5 *Taunton,* 36]

This was an action of assumpsit, brought under the following circumstances: In 1799, Joseph Hiller, the son of Mrs. Muggeridge, the defendants' testatrix, by a former husband, falling into embarrassed circumstances, she, in order to induce the plaintiff, his father-in-law, to relieve him, proposed by letter to become security to the extent of 2000*l.* by a bond payable at her death. The plaintiff ac-

[1] Flight *v.* Reed, 1 H. & C. 703; Garvin *v.* Linton, 62 Ark. 370; Kilbourn *v.* Bradley, 3 Day, 356; Kassing *v.* Ordway, 100 Ia. 611; Vermeule *v.* Vermeule, 95 Me. 138; Sheldon *v.* Haxtun, 91 N. Y. 124, *acc.* See also Tucker *v.* West, 29 Ark. 386; Gwinn *v.* Simes, 61 Mo. 335; Melchoir *v.* McCarty, 31 Wis. 252.

cordingly advanced the money to Joseph Hiller; and Mrs. Muggeridge by her bond, dated the 4th of August, 1799, became bound to the plaintiff in the penal sum of 4000*l.*, with condition that the heirs, executors, or administrators of Mrs. Muggeridge should, within six months after her decease, pay to the plaintiff 1999*l.* 19*s.*, with such part of the interest as Joseph Hiller should omit to pay; it being agreed that he should pay the interest half yearly. Joseph Hiller having neglected to pay the interest, the plaintiff in the year 1804 wrote to Mrs. Muggeridge, requesting payment of the arrears; to which she, after her husband's death, returned an answer by letter, stating "that it was not in her power to pay the bond off, her time here was but short, and that would be settled by her executors."

It appeared that Mrs. Muggeridge had a considerable separate estate when the bond was given, which she acquired from the father of Joseph Hiller, and the bulk of which she gave by her will to the defendant, Nathaniel Muggeridge. After an ineffectual attempt to establish that the bond constituted an equitable lien or charge upon the separate estate of Mrs. Muggeridge (see 1 V. & B. 118), the plaintiff brought the present action, founded upon the promise contained in the letter above referred to. The declaration stated (*inter alia*) that the testatrix, after the death of her husband, and whilst she was sole, to wit, on the 11th of July, 1804, "in consideration of the premises undertook to the plaintiff that the bond, that is to say, the principal money and interest secured by the bond, should be settled, that is to say, paid, by her executors." The defendants pleaded the general issue; and upon the trial of the cause at the Sittings after Hilary Term, 1813, at Guildhall, before Gibbs, J., the jury found a verdict for the plaintiff.[1]

Shepherd, Serjt., in Easter Term last, moved in arrest of judgment, on the ground that no sufficient consideration was shewn for the promise of the deceased. The Court granted a rule *nisi.*

Lens and *Best,* Serjts., in this term shewed cause.

Shepherd and *Vaughan,* Serjts., contra.

Mansfield, C. J. The counsel for the plaintiffs need not trouble themselves to reply to these cases: it has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is, Whether upon this declaration there appears a good moral obligation! Now I cannot conceive that there can be a stronger moral obligation than is stated upon this record. Here is this debt of 2,000*l.* created at the desire of the testatrix, lent in fact to her, though paid to Hiller. After

[1] In the original report the declaration is set forth with much fulness; but as it is exceedingly prolix, and most of it is wholly irrelevant to the one question argued and decided in the case, it is here omitted, and a statement of the material facts is substituted in its place. Some of the facts stated have been obtained from the report in 1 V. & B. 118.

her husband's death, she, knowing that this bond had been given, that her son-in-law had received the money, and had not repaid it, knowing all this, she promises that her executors shall pay; if, then, it has been repeatedly decided that a moral consideration is a good consideration for a promise to pay, this declaration is clearly good. This case is not distinguishable in principle from Barnes *v.* Hedley; there, not only the securities were void, but the contract was void; but the money had been lent, and, therefore, when the parties had stripped the transaction of its usury, and reduced the debt to mere principal and interest, the promise made to pay that debt was binding. Lord Mansfield's judgment in the case of Doe on the demise of Carter *v.* Straphan is extremely applicable. Here, in like manner, the wife would have been grossly dishonest, if she had scrupled to give a security for the money advanced at her request.

Rule discharged.[1]

BINNINGTON *v.* WALLIS

In the King's Bench, June 29, 1821

[*Reported in* 4 *Barnewall & Alderson,* 650]

Declaration stated that, before the making of the promise and undertaking, the plaintiff had cohabited with the defendant as his mistress, and an immoral connection and intercourse had existed between them for a long space of itme, to wit, for the space of twelve years; and the plaintiff had thereby been greatly injured in her character and reputation, and deprived of the means of honestly procuring a livelihood; and that, before the time of the making of the promise, to wit, on the 1st of January, 1816, at, &c., the plaintiff wholly ceased to cohabit with the said defendant as his mistress, and to have any immoral intercourse with him; and thereupon it was determined and agreed between them that no immoral intercourse or connection should ever again take place between them; and that the defendant, as a compensation for the injury so sustained by the plaintiff, should pay and allow to the plaintiff the quarterly sum of 10*l.*, while she should be and continue of good and virtuous

[1] Walker *v.* Arkansas Nat. Bank, 256 Fed. 1; Brownson *v.* Weeks, 47 La. Ann. 1042; Wilson *v.* Burr, 25 Wend, 386; Goulding *v.* Davidson, 26 N. Y. 604; Hemphill *v.* McClimans, 24 Pa. 367; Leonard *v.* Duffin, 94 Pa. 218; Brooks *v.* Merchants' Bank, — 125 Pa. 394; Rathfon *v.* Locker, 215 Pa. 571, *acc.;* Dixie *v.* Worthy, 11 U. C. Q. B. 328; Watson *v.* Dunlap, 2 Cranch C. C. 14; Thompson *v.* Hudgins, 116 Ala. 93; Waters *v.* Bean, 15 Ga. 358; Thompson *v.* Minnich, 227 Ill. 430; Maher *v.* Martin, 43 Ind. 314; Long *v.* Brown, 66 Ind. 160; Austin *v.* Davis, 128 Ind. 472; Holloway's Assignee *v.* Rudy, 60 S. W. Rep. 650 (Ky.); Lyell *v.* Walbach, 113 Md. 574; Porterfield *v.* Butler, 47 Miss. 165; Musick *v.* Dodson, 76 Mo. 624; Bragg *v.* Israel, 86 Mo. App. 338; Kent *v.* Rand, 64 N. H. 45; Condon *v.* Barr, 49 N. J. L. 53; Long *v.* Rankin, 108 N. C. 333; Wilcox *v.* Arnold, 116 N. C. 708; Hayward *v.* Barker, 52 Vt. 429; Valentine *v.* Bell, 66 Vt. 280, *contra.* See also Parker *v.* Cowan, 1 Heisk, 518.

life, conversation, and demeanor; and thereupon, in consideration of the premises, and that the plaintiff at the request of the defendant would resign and give up the said quarterly sum, he undertook to pay her so much money as the said quarterly sum was reasonably worth, in order to enable her to continue to live in a virtuous and decorous manner. The declaration then averred that the plaintiff did resign and give up the said quarterly sum, and the same from thence wholly ceased and determined; and that she had always, from the time of the cessation of the immoral connection, lived in a virtuous and decorous manner, and been of virtuous life, conversation, and demeanor. It then averred that the quarterly sum was reasonably worth 400*l.*; and then alleged as a breach non-payment by the defendant. The other counts omitted any mention of the quarterly allowance, and in other respects were similar to this. To this declaration there was a general demurrer.

Parke, in support of the demurrer.

Holt, contra.

Per Curiam. The declaration is insufficient. It is not averred that the defendant was the seducer, and there is no authority to show that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited[1] are distinguishable from this, because they are all cases of deeds; and it is a very different question whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void. There must therefore be judgment for the defendant.

Judgment for defendant.[2]

LITTLEFIELD, *Executrix of* John Littlefield *v.* ELIZABETH SHEE

In the King's Bench, November 4, 1831

[*Reported in* 2 *Barnewall & Adolphus,* 811]

Assumpsit for goods sold and delivered. The fourth count stated that John Littlefield in his lifetime, at the special instance and request of the defendant, had supplied and delivered to her divers goods and chattels for the sum of 16*l.*; and thereupon, in consideration of the premises, and of the said sum of money being due and unpaid, the defendant, after the death of the said John Littlefield, undertook and promised the plaintiff as executrix of J. L. to pay

[1] Annandale *v.* Harris, 2 Peere W. 433; Turner *v.* Vaughan, 2 Wils. 339. See also Nye *v.* Moseley, 6 B. & C. 133; Massey *v.* Wallace, 32 S. C. 149.

[2] In Beaumont *v.* Reeve, 8 Q. B. 483, it was held that even though the defendant was the seducer, a subsequent promise was not binding. Wallace *v.* Rappleye, 103 Ill. 229, 250, *acc.* See also Wiggins *v.* Keizer, 6 Ind. 252. Shenk *v.* Mingle, 13 Serg & R. 29, *contra.* See also Jennings *v.* Brown, 9 M. & W. 496; Wyant *v.* Lesher, 23 Pa. 338.

her the said sum of money as soon as it was in her (the defendant's) power so to do. And although afterwards, to wit, on, &c., at, &c., it was in her power to pay the said sum, yet she did not do so. Plea: the general issue. At the trial before Gaselee, J., at the last Assizes for Sussex, it appeared that the action was brought to recover 15*l.* for butcher's meat supplied by the testator to the defendant, for her own use, between September, 1825, and March, 1826. During that time the defendant was a married woman, but her husband was abroad. After his death she promised to pay the debt when it should be in her power, and her ability to pay was proved at the trial. The learned judge held that, the defendant having been a *feme covert* at the time when the goods were supplied, her husband was originally liable, and consequently there was no consideration for the promise declared upon. The plaintiff was therefore nonsuited. *Hutchinson,* on a former day in this Term, moved to set aside the nonsuit, and to enter a verdict for the plaintiff on the fourth count; on the ground that, the goods having been supplied to the defendant while she was living separate from her husband, she was under a moral obligation to pay for them, and such obligation was a sufficient consideration for a subsequent promise. It was not necessary that there should have been an antecedent legal obligation. Barnes *v.* Hedley, Lee *v.* Muggeridge. *Cur. adv. vult.*

Lord Tenterden, C. J., now delivered the judgment of the Court. The fourth count of the declaration states that the testator had at the request of the defendant supplied her with goods, and that in consideration of the premises, and of the price of the goods being due and unpaid, the defendant promised. Now, that is in substance an allegation that those sums were due from her, and the plaintiff failed in proof of that allegation, because it appeared that the goods were supplied to her whilst her husband was living, so that the price constituted a debt due from him. We are therefore of opinion that the declaration was not supported by the proof, and that the nonsuit was right. In Lee *v.* Muggeridge all the circumstances which showed that the money was in conscience due from the defendant were correctly set forth in the declaration. It there appeared upon the record that the money was lent to her, though paid to her son-in-law, while she was a married woman; and that after her husband's death, she, knowing all the circumstances, promised that her executor should pay the sum due on the bond. I must also observe that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation.

Rule refused.[1]

[1] Meyer *v.* Haworth, 8 A. & E. 467, presented similar facts except that the defendant was living in open adultery (which exempted her husband from liability for her necessary expenses) and the plaintiff was ignorant when he furnished the goods of both the defendant's marriage and her adultery. The court held the plaintiff could not recover.

DANIEL MILLS *v.* SETH WYMAN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1825

[*Reported in* 3 *Pickering,* 207]

THIS was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this State. Levi Wyman, at the time when the services were rendered, was about twenty-five years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant; and Howe, J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

J. Davis and *Allen,* in support of the exceptions.

Brigham for the defendant.

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound *in foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promised in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo,* and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts, but the voluntary revival or creation of obligations which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify

withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the Statute of Limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pul. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though

the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this Commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.[1]

[1] Loomis *v.* Newhall, 15 Pick, 159; Dodge *v.* Adams, 19 Pick. 429; Kelley *v.* Davis 49 N. H. 187; Freeman *v.* Robinson, 38 N. J. L. 383; Nine *v.* Starr, 8 Org. 49; Valentine *v.* Bell, 66 Vt. 280, *acc.* Similarly, the promise of a child to pay for past support of an indigent parent has been held invalid. Cook *v.* Bradley, 7 Conn. 57; Parker *v.* Carter, 4 Munf. 273; Davis *v.* Anderson, 99 Va. 625. See also Ellicott *v.* Turner, 4 Md. 476; Hook *v.* Pratt, 78 N. Y. 371.

In a reporter's note to Wennall *v.* Adney, 3 B. & P. 249, published in 1804, the reporter thus summarised the result of the decisions:

"An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

In most jurisdictions a moral obligation is now held insufficient consideration, and the distinction suggested in the note to Wennall *v.* Adney is invoked to support only such promises as the ratification of an infant's promise or a promise to pay a debt barred by bankruptcy or the Statute of Limitations. See 53 L. R. A. 353 *n.* In a few jurisdictions, however, the doctrine that moral obligation may support a promise is still in force. Ga. Code, § 2741; McElven *v.* Sloan, 56 Ga. 208, 209; Gray *v.* Hamil, 82 Ga. 375; Brown *v.* Latham, 92 Ga. 280; Spear *v.* Griffith, 86 Ill. 552; Lawrence *v.* Oglesby, 178 Ill. 122 (but see Hobbs *v.* Greifenhagen, 91 Ill. App. 400); Pierce *v.* Walton, 20 Ind. App. 66; Robinson *v.* Hurst, 78 Md. 59; Edwards *v.* Nelson, 51 Mich. 121; Hemphill *v.* McClimans, 24 Pa. 367; Landis *v.* Royer, 59 Pa. 95; Stebbins *v.* Crawford, 92 Pa. 289; Holden *v.* Banes, 140 Pa. 63; Sutch's Appeal, 201 Pa. 305; State *v.* Butler. 11 Lea, 418. See also Ferguson *v* Harris, 39 S. C. 323.

ISRAEL GROB AND ANOTHER *v.* DAVID GROSS

NEW JERSEY, July 5, 1912–November 11, 1912

[*Reported in* 83 *New Jersey Law,* 430]

KALISCH, J. The plaintiffs obtained a judgment against the defendant for $500 in the Second District Court of Jersey City, the court sitting without a jury.

The trial judge found the facts following:

"I find that on the 23d day of May, 1911, the defendant, David Gross, executed and delivered the following guarantee at the plaintiffs' request, namely:

"'Hoboken, N. J., May 23d, 1911.

"'I hereby agree to pay to I. Grob & Co. for any amount of flour delivered to Mrs. Rose Bier of No. 114 Willow avenue, Hoboken, N. J., to any amount to $500.00 (five hundred 00/100).

"'D. GROSS,
"'421 Newark Street,
"'Hoboken, N. J.'

"And that immediately after its execution plaintiffs furnished flour to Rose Bier to the value of $99, and that the defendant then told the plaintiffs to advance no further credit on his said guarantee to Rose Bier. That in August, 1911, defendant promised to pay and said he would live up to his guarantee. Thereafter, disregarding such request, plaintiffs continued to advance credit to Rose Bier from time to time, until the 29th day of July, 1911. Between the time of the signing of the guarantee and the 29th day of July, 1911, plaintiffs sold and delivered to Rose Bier flour as set forth in the bill of particulars annexed to the plaintiffs' state of demand, amounting to $2,168.11, whereon she made payments aggregating $1,669.95, on the days and in the amounts set forth in the credits annexed to the plaintiffs' state of demand, so that at the time action was brought there was due from Rose Bier to the plaintiffs $502.16, and that the excess over $500 was waived by plaintiffs; that by virtue of said guarantee above set forth I find that the defendant, David Gross, is indebted to the plaintiffs in the sum of $500."

It is to be observed that when the defendant made the promise to pay and said he would live up to the agreement the goods had already to be furnished to Mrs. Bier, the last bill sold being July 29th.

At the time the plaintiffs were notified by the defendant not to advance any further credit to Rose Bier on the guarantee, her indebtedness to the plaintiffs was $99 for goods furnished her by them, and which was subsequently paid by her.

The limit of $500 in the guarantee has reference to the amount of the guarantor's liability, and not to the amount of dealing between

the purchaser and the one giving credit. The guarantee in question did not contemplate a single transaction.

Under the adjudicated cases of this state the guarantee was a continuing one. Columbia Electrical Co. *v.* Kemmet, 38 Vroom 18; Newcomb *v.* Kloeblen, 48 Id. 791.

It is equally clear that the guarantee was revocable.

Speaking of this class of guarantees, Lush, L. J., in Lloyds *v.* Harper, 16 Ch. Div. 319, says: "Instances of the second class are more familiar. They are where a guarantee is given to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied. There the consideration is supplied from time to time; and it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. He remains answerable for all the advances made, or all the goods supplied upon his guarantee, before the notice to determine it is given; but at any time he may say, 'I put a stop to this; I do not intend to be answerable any further; therefore do not make any more advances, or supply any more goods, upon my guarantee.' As at present advised, I think it is quite competent for a person to do that where, as I have said, the guarantee is for advances to be made or goods to be supplied, and where nothing is said in the guarantee about how long it is to endure." 20 *Cyc.* 1479, and cases there cited.

The guarantee having been revoked by the defendant, the plaintiffs after notice of such revocation continued to furnish goods to Mrs. Bier, and now seek to hold the defendant liable because subsequently to the incurred indebtedness it appears that the defendant made a verbal promise to pay and said he would live up to his guarantee.

This promise made, as it was, after the goods had been furnished to Mrs. Bier, was the promise to pay the debt of another and was without any consideration.

The judgment of the District Court will be reversed.

SAMUEL B. RINDGE *v.* WILLIAM H. KIMBALL

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 6, 1878

[*Reported in* 124 *Massachusetts,* 209]

CONTRACT upon a promissory note for $500, payable to the order of the defendant, and indorsed by him to the plaintiff.

At the trial in the Superior Court, before PITMAN, J., without a jury, it appeared that no demand had been made on the note or notice of non-payment given to the defendant; but it was admitted that the defendant wrote on the back of the note the words, "Waive de-

mand and notice." The evidence was conflicting upon the question whether these words were written before or after the note was due.

The defendant testified that he wrote these words upon the note intelligently and intentionally, with a full knowledge of all the material facts. The judge ruled that such a waiver of demand and notice was as effectual after as before the maturity of the note, and ordered judgment for the plaintiff. The defendant alleged exceptions.

R. Lund, for the defendant.

J. Cutler, for the plaintiff, was not called upon.

By the Court. This point has been repeatedly determined by recent decisions of this court, and should not have been brought up again. Matthews *v.* Allen, 16 Gray, 594; Harrison *v.* Bailey, 99 Mass. 620; Third National Bank *v.* Ashworth, 105 Mass. 503.

Exceptions overruled.[1]

BENJAMIN G. DUSENBURY *v.* MARK HOYT

New York Court of Appeals, September 29–October 7, 1873

[*Reported in* 53 *New York,* 521]

Appeal from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant entered upon a verdict, and affirming order denying motion for a new trial. (Reported below, 45 How. Pr. 147.)

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove a subsequent promise of the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The Court sustained the objection, and directed a verdict for defendant, which was rendered accordingly.

D. M. Porter, for the appellant.

Cephas Brainerd, for the respondent.

Andrews, J. The 34th section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subse-

[1] The numerous decisions in accord are collected in 1 Williston, Contracts, § 157. Decisions in which a surety, who had been discharged by lack of notice of acceptance or dishonor, was held bound by a promise to pay, are collected in Ames's Cases on Suretyship, 227, *n.*; and in 1 Williston, Contracts, § 157.

quent promise by the bankrupt to pay the debt, gives a right of action. It was held in Shippey *v.* Henderson (14 Johns. 178), that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply the new promise in avoidance of the discharge set out in the plea. The Court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defence of infancy or the Statute of Limitations[1] was relied upon. The case of Shippey *v.* Henderson was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. McNair *v.* Gilbert, 3 Wend. 344; Wait *v.* Morris, 6 id. 394; Fitzgerald *v.* Alexander, 19 id. 402.

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defence which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by MARCY, J., in Depuy *v.* Swart (3 Wend. 139), and is probably the one best supported by authority. But, after as before the decision in that case, the Court held that the original demand might be treated as the cause of action, and, for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defence of infancy or the Statute of Limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. (Esselstyn *v.* Weeks, 12 N. Y. 635.)

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge, to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

All concur, except FOLGER, J., not voting. *Judgment reversed.*[2]

[1] See Encyc. of Pleading and Practice, vol. 13, p. 247.

[2] See Lowell on Bankruptcy, § 248; 1 Williston, Contracts, § 158.

DAVID ILSLEY *v.* JOHN JEWETT AND OTHERS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1841

[*Reported in* 3 *Metcalf,* 439]

THIS was an action of debt on a bond for the liberty of the prison limits, and was submitted to the Court on the following facts agreed by the parties: —

In 1814, the plaintiff paid money as surety for John Jewett, one of the defendants, and in 1840 brought a suit against him to recover back the money so paid. Said Jewett, among other defences, relied on the Statute of Limitations. The plaintiff, to meet this part of the defence, proved a part payment by the defendant, in 1839, and by reason thereof recovered judgment against him at November Term, 1840, as stated and shown in the report of the case of Ilsley *v.* Jewett, 2 Met. 168, which is to be considered as part of this case. Said judgment was for the sum of $349.89 damages, and $44.95 costs of suit, and the plaintiff took out execution thereon, and caused the defendant to be committed, on said execution, to the jail in Ipswich. Said defendant, and his co-defendants in this suit, as his sureties, thereupon gave bond for the liberty of the prison limits, conditioned (as is required by the Rev. Stats., c. 97, § 63), that he would not go without the exterior limits of the prison until he should be lawfully discharged, &c. But after the giving of said bond, and before the commencement of this suit, and also before he was discharged, he went, several times, without the boundaries of the town of Ipswich.

Defendants to be defaulted, if such going without the boundaries of the town of Ipswich was a breach of the condition of said bond; if not, the plaintiff to become nonsuit.

O. P. Lord, for the plaintiff. By the Rev. Stats., c. 14, § 14, a debtor, committed on execution issuing upon a judgment recovered on a contract made before the 2d of April, 1834, is entitled only to the limits of the jail yard as established by Stat. 1834, c. 201; viz., the boundaries of the city or town in which the jail to which he is committed is situated. The single question presented by the facts agreed is, therefore, this. Was the judgment recovered by the plaintiff against John Jewett, in 1840, recovered on a contract made in 1814 or in 1839? on the old contract, which arose upon the plaintiff's paying money for him, as his surety, or on the new promise made by him, in 1839, by his making part payment?

The Statute of Limitations bars only the remedy on a contract, and does not discharge the contract itself. Unless a new promise or acknowledgment is made, the remedy is barred from considerations of public policy, laying out of the question any consideration whether the debt be or be not paid. *Per* Sedgwick, J., 7 Mass. 517; S. P. 13 Mass. 203. But when a new promise or acknowledgment is made,

"the contract is not within the intent of the statute." Baxter *v.* Penniman, 8 Mass. 134; Fiske *v.* Needham, 11 Mass. 453. See also Newlin *v.* Duncan, 1 Harring. 204.

A judgment on a demand which is taken out of the operation of the Statute of Limitations by a new promise is recovered on the original contract, and not on the new promise. This appears from various considerations. Thus: In Cogswell *v.* Dolliver, 2 Mass. 223, it was said by Sedgwick, J., that if any articles charged in an account were sold and delivered within six years next before action brought, "they will draw after them the articles beyond six years, and exempt them from the operation of the statute."

An acknowledgment made after action brought will support the action on the original contract. Yea *v.* Fouraker, 2 Bur. 1099. So an acknowledgment by an executor, administrator, or guardian, will bind the estate of the deceased or the ward. Brown *v.* Anderson, 13 Mass. 203; Emerson *v.* Thompson, 16 Mass. 429; Manson *v.* Felton, 16 Pick. 206. So an acknowledgment made to a stranger will prevent the operation of the statute. Richardson *v.* Fen, Lofft, 86; Mountstephen *v.* Brooke, 3 Barn. & Ald. 141; Peters *v.* Brown, 4 Esp. 46; Harvey *v.* Tobey, 15 Pick. 99. And a parol acknowledgment of a contract, required by the Statute of Frauds to be in writing, has the same effect. Gibbons *v.* M'Casland, 1 Barn. & Ald. 690. So an acknowledgment by one joint debtor will bind the others. Whitcomb *v.* Whiting, 2 Doug. 652; Perham *v.* Raynal, 2 Bing. 306; Johnson *v.* Beardslee, 15 Johns. 3; White *v.* Hale, 3 Pick. 291. Even by one partner after a dissolution of the partnership. Wood *v.* Braddick, 1 Taunt. 104; Simpson *v.* Geddes, 2 Bay, 533.

In addition to all these proofs that the original contract has always been regarded as the cause of action, is the universal practice of declaring on the original contract, and the established doctrine that proof of a new promise supports such declaration. Leaper *v.* Tatton, 16 East, 423; Upton *v.* Else, 12 Moore, 304.

Perkins (*Ward* was with him), for the defendants. John Jewett, by giving the plaintiff a negotiable note in part payment (2 Met. 169), entered into a new contract, and gave the plaintiff a new remedy. "The reason," say Lord Ellenborough and Parke, J., "why a part payment takes a case out of the statute is, that it is evidence of a fresh promise." 1 Barn. & Ald. 93; 3 Barn. & Adolph. 511; S. P. Sigourney *v.* Drury, 14 Pick. 390, 391; Clark *v.* Hooper, 10 Bing. 481. A new promise subjects a defendant to the remedy applicable to a new contract. In Presbrey *v.* Williams, 15 Mass. 194, where part payment had been made on a note, Jackson, J., said, the plaintiff "might have brought his action" on the day of such payment, "as upon the new promise then made." In Little *v.* Blunt, 9 Pick. 494, Wilde, J., says: "the new promise actually gives the remedy, and is substantially the cause of action." And Richardson, C. J., in Exeter Bank *v.* Sullivan, 6 N. H. 136, says, "the new

promise is not deemed to be a continuance of the original promise, but a new contract supported by the original consideration." S. P. 3 Bing. 643, *per* Gaselee, J., Pittam *v.* Foster, 1 Barn. & Cres. 250; Tanner *v.* Smart, 6 Barn. & Cres. 606; Jones *v.* Moore, 5 Binn. 577; 4 Phil. Ev. (4th Amer. ed.) 138; Bell *v.* Morrison, 1 Pet. 371. Acknowledgment of a promise by a party, and that he has not performed it, "creates a debt," says Bayley, J., 16 East, 423. These authorities show that a new promise does not operate by way of reviving the old promise or waiving the statute bar, but by creating a fresh contract. There is, at the present day, no difference between promises to pay debts barred by the Statute of Limitations and debts discharged under a bankrupt or insolvent act, or debts contracted during infancy. An express promise is necessary to remove either of these bars. Robarts *v.* Robarts, 3 Car. & P. 296; Oakes *v.* Mitchell, 3 Shepley, 360; Moore *v.* Bank of Columbia, 6 Pet. 86; Sands v. Gelston, 15 Johns. 519. As it regards the Statute of Limitations, there must be a cause of action within six years; and that cause accrues upon the making of a new express promise. The old promise — as in case of a bankrupt or infant — is merely a basis or consideration for the new one. Lonsdale *v.* Brown, 4 Wash. C. C. 150; Searight *v.* Craighead, 1 Pennsyl. 138; Mills *v.* Wyman, 3 Pick. 209, 210. The new promise may be declared on (1 Selw. N. Prius, 4th Amer. ed., 49), which shows that it is a new cause of action. It is, indeed, the common practice, as Lord Ellenborough says, 16 East, 423, to declare on the original contract. "Probably," says Best, C. J., 12 Moore, 304, "the new promise ought in strictness to be declared on specially, but the practice is inveterate the other way." In 3 Bing. 332, he expressed a still stronger opinion. But this practice is anomalous, and is not allowed in suits by executors or administrators. In England, and perhaps in all the States of the Union except Massachusetts and New Hampshire, if an executor or administrator sues for a debt of the deceased, and relies on a new promise to himself to take it out of the Statute of Limitations, he must declare specially on the new promise, or the evidence of such promise will not support the declaration. Stephen Pl. 405, 406; Gould Pl. 453, 454; 2 Stark. Ev. 552, and American cases cited in the notes; 1 Chitty Pl. (6th Amer. ed.) 234, 392. See also Pittam *v.* Foster, 1 Barn. & Cres. 248; Lawes Pl. in Assump. 730–732. In Baxter *v.* Penniman, 8 Mass. 133, and in Buswell *v.* Roby, 3 N. H. 467, it was held, however, that an administrator need not declare on the new promise; and thus the anomaly has been extended further, in this Commonwealth and in New Hampshire, than is known to have been done elsewhere. But whether the one or the other form of declaring is adopted, yet, as said by Wilde, J., "the new promise gives the remedy, and is substantially the cause of action; for without it there was no cause of action." 9 Pick. 492, 494. The statute bar is removed by a new promise, either because the presumption

of payment is thereby removed; or because the defendant thereby waives the benefit of the statute; or because a new contract is thereby made, which is supported by the old consideration. The cases that have been cited show that the latter is the only reason which courts now recognize; and therefore, as the new contract gives the remedy, and is the contract on which in effect the judgment is recovered, the defendant, if committed in execution on the judgment, is entitled to the enlarged jail limits; viz., the whole county. Rev. Stats., c. 14, § 13.

Shaw, C. J. In debt on a prison bond given July 14, 1841, the question is, whether the bond was broken by the escape of the prisoner; and this again depends upon the question, what were the prison limits of Ipswich jail, for this prisoner, in 1841? This depends upon Rev. Stats., c. 14, §§ 13, 14, prescribing different limits in different cases. "On executions issuing upon judgments, recovered upon contracts made before the 2d of April, 1834, the limits of each jail shall remain as the same were established previously to that day." § 14. It is conceded that, prior to 1834, the jail limits included a space much less than the bounds of the town of Ipswich. If, then, the contract on which the plaintiff recovered his former judgment, in pursuance of which the defendant was committed, was made prior to the 2d of April, 1834, so that the limits for him were those which existed in 1834, then the defendant made an escape, and the bond was forfeited.

It appears that Adams and Ilsley were sureties for John Jewett on a promissory note; that Adams paid the whole in the first instance; that afterwards Adams demanded of the plaintiff one-half, by way of contribution, as he had a right to do; and the plaintiff paid the same, as he was bound to do. On that payment, the defendant, John Jewett, as principal promisor, became indebted to the plaintiff, and liable to pay him the same amount on demand. This liability arose from the implied promise of the principal, made at the time of the plaintiff's becoming his surety, that, in case the plaintiff should be called on to pay any thing in consequence of such suretyship, the principal would repay the same on demand. [See Appleton *v.* Bascom, 3 Met. 171.]

Afterwards, in 1839, the transaction took place, as stated in 2 Met. 188, which was held by the Court sufficient evidence of part payment to take the case out of the Statute of Limitations, and the plaintiff had judgment; and the question is, whether this is a judgment recovered on a contract made before April, 1834. The case has been very well argued on both sides, and all the authorities, we believe, fully cited. The Court are of opinion that the judgment must be considered as rendered on the old contract; that a payment, or new promise, or an admission from which a new promise may be inferred, is considered as removing out of the way a bar arising from the Statute of Limitations, so as to enable the creditor to re-

cover notwithstanding the limitation; and not as the creation of a new substantive contract, which is to be the basis of the judgment. We are therefore of opinion that the facts show a breach of this bond, and that the plaintiff is entitled to recover.

Defendants defaulted.[1]

LORIN WAY *v.* CHARLES SPERRY

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1850

[*Reported in* 6 *Cushing,* 238]

THIS was an action of assumpsit, commenced on the 12th of July, 1848, to recover the amount of three promissory notes, signed by the defendant, and indorsed by the several payees thereof to the plaintiff on the day of the commencement of the action. These notes were described in the plaintiff's bill of particulars, as follows: "One dated February 23, 1836, for $18, payable to Ebenezer Watson, or order, in one year, with interest; one dated March 2, 1838, for $7.36, payable to Ebenezer Watson and one Flanders, or order, on demand, with interest; and one dated March 14, 1839, for $18.30, payable to Ebenezer Watson, or order, on demand, with interest."

The defendant pleaded the general issue, and in defence relied on the Statute of Limitations, and a discharge in bankruptcy, dated January 9, 1843, which was duly proved, and by its terms embraced the note in question.

At the trial in the Court of Common Pleas, before Mellen, J., it was in evidence, that the defendant, in May, 1843, left Columbia, in the State of New Hampshire, where the notes were dated, and became an inhabitant of Lowell.

It was also testified by Watson, the payee of the notes, that the defendant, in the year 1845, being then at Claremont, in New Hampshire, said he would pay Watson the notes as soon as he possibly could; that he was not then in a situation to pay them, but that Watson need not give himself any uneasiness, the notes should be paid as soon as possible; that in January, 1846, he again saw the defendant in Lowell, who said, that he was then engaged upon a job of stone-work, and should have the money in April, and that if Watson would come or send down then, he would pay one half of the notes; but the defendant declined taking up the notes and giving a new one for them.

There was also evidence that the defendant was of ability to pay the notes, but no evidence of any new consideration for his promises to pay them.

The defendant, upon this evidence, contended, that the first de-

[1] Cases involving the effect of new promises upon the Statute of Limitations are so numerous that reference must be made to the treatises on the subject.

scribed note was barred by the Statute of Limitations; that no action could be maintained on the notes, or on the defendant's new promises, without showing a consideration for the latter; that the promise of the defendant to pay the notes, made subsequently to his discharge in bankruptcy, if available at all, could only support an action in favor of the promisee, and did not revive the negotiable quality of the notes, so as to entitle a subsequent indorsee to maintain an action, either upon the notes or upon the new promise.

But the presiding judge was of opinion, that the action could be maintained upon the evidence, and directed the jury accordingly, who returned a verdict for the plaintiff, whereupon the defendant excepted.

T. Wentworth, for the defendant.

J. G. Abbott, for the plaintiff.

The opinion of the Court was delivered at the October Term, 1851.

Metcalf, J. The case of Bulger *v.* Roche, 11 Pick. 36, is a decisive answer to the defence set up by the defendant, under the Statute of Limitations, against the first note specified in the plaintiff's bill of particulars; and the only other point to be decided is, whether the defendant's discharge in bankruptcy is a defence to that and the two other notes in suit.

The plaintiff relies on a promise made to the payee of the notes, by the defendant, since his discharge. And it is well settled, that a distinct and unequivocal promise to pay a debt so discharged, or a promise to pay it on a condition which is afterwards fulfilled, is binding on the promisor, and may be enforced by action. Upon these exceptions, it must be taken that a binding promise by the defendant was proved at the trial. No new consideration was necessary to the validity of the promise; Chit. Con. (5th Amer. ed.) 190; Penn *v.* Bennett, 4 Campb. 205; and no statute requires it to be in writing.

But the defendant contends that if he is bound at all by his promise, he is bound only to the payee of the notes, to whom he made it, and that it did not revive or restore the negotiability of the notes. And his counsel cited Dupuy *v.* Swart, 3 Wend. 135; Moore *v.* Viele, 4 Wend. 420, and Walbridge *v.* Harroon, 18 Verm. 448, where it was so decided. Since the argument, a similar decision of the court of Maine has been published. White *v.* Cushing, 17 Shepley, 267. The grounds of these decisions, as stated in the report of the first of them, were, that "the new promise is the contract upon which the action must rest;" that "the new promise does not renew the old contract, and renovate the note given on that contract;" that "the existence of the note is destroyed by the discharge, and cannot be revived and restored to all its former properties by the maker's entering into a new contract, by which he becomes liable to pay what was due on the old contract;" and that "the defendant's liability, therefore, is on the new contract, and that the suit should be in the name of him with whom such contract is made."

We are not satisfied with these grounds of decision. For we take it to be well established that, in actions brought on promises made by infants, and ratified after they come of age; on promises which have been renewed after the Statute of Limitations has furnished a bar; and on unconditional promises by discharged insolvent debtors and bankrupts, to pay debts from which they have been discharged, the plaintiff may declare on the original promise; and that when infancy, the Statute of Limitations, or a discharge in insolvency or bankruptcy, is pleaded or given in evidence, as a defence, the new promise may be replied or given in evidence, in support of the promise declared on; that a replication, alleging such new promise, is not a departure, and that evidence thereof is not irrelevant. And we do not hold that a note, promise, or debt, is "destroyed" by a discharge in bankruptcy. If it were, it not only could not be renewed or revived, but it could not be a consideration for a new promise. Yet nothing is clearer, on authority, than that the old debt is a sufficient consideration for such promise. In all the cases above mentioned, the new promise operates as a waiver, by the promisor, of a defence with which the law has furnished him against an action on the old promise or demand. Maxim *v.* Morse, 8 Mass. 127; Foster *v.* Valentine, 1 Met. 522, 523.

We cannot perceive any legal difference, as to the point now in question, between the case of a debt that has been discharged by a process in bankruptcy, and a claim voidable on the ground of infancy, or barred by the Statute of Limitations. In the latter case, it has been decided that a new promise removes the statute bar, but does not create a new and substantive cause of action which is the basis of a judgment; and that the judgment must be considered as rendered on the old contract. Ilsley *v.* Jewett, 3 Met. 439. And where an infant gave a negotiable note, which he ratified by a new promise after he was of age, it was decided that he was liable on it to an indorsee to whom the payee negotiated it after the ratification. The Court said the ratification gave the contract "the same effect as if the promisor had been of legal capacity to make the note when he made it. This made it a good negotiable note from that time, according to its tenor; of course, when transferred to the plaintiff, he took it as a negotiable note, and may maintain an action on it." Reed *v.* Batchelder, 1 Met. 559. And the indorsement of a note, after a new promise to the payee has taken it out of the Statute of Limitations, enables the indorsee to sue the maker. Little *v.* Blunt, 9 Pick. 488, and 16 Pick. 359. The same rule is applicable to the case at bar. A new promise made to the payee of a negotiable note is a promise to pay him or order, or bearer, according to its tenor.

Exceptions overruled.[1]

[1] Bird *v.* Adams, 7 Ga. 505; Soulden *v.* Van Rensselaer, 9 Wend. 293; Clark *v* Atkinson 2 E. D. Smith, 112, *acc.*; Thompson *v.* Gilreath, 3 Jones L. 493, *contra.*

STATE TRUST COMPANY *v.* JOHN A. SHELDON ET ALS.

VERMONT SUPREME COURT, OCTOBER TERM, 1895

[*Reported in* 68 *Vermont,* 259]

THOMPSON, J. As a part of the promises and undertaking in the declaration mentioned, and at the time of making the same, the defendants agreed in writing to waive the Statute of Limitations in respect to such promises and undertaking. Relying upon this agreement the plaintiff did not bring its action until more than six years from the time that it accrued. The question presented by the pleadings is whether the defendants are estopped by the agreement from pleading the Statute of Limitations in bar of plaintiff's action.

It is urged that the agreement to waive the statute is void because by private agreement it seeks to avoid a statute, and is against public policy.

The general rule is, that no contract or agreement can modify a law, but the exception is, that where no principle or public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual. The statute limiting the time within which actions shall be brought is for the benefit and repose of individuals and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form by those who are entitled to it, and such waiver, when acted upon, becomes an estoppel to plead the statute. Sedgw. Stat. and Const. Law (2d ed.), 86–87; Quick *v.* Corliss, 39 N. J. L. 11; Burton *v.* Stevens, 24 Vt. 131; Gay *v.* Hassom, 64 Vt. 495; Random *v.* Tobey, 11 How. (U. S. 493). When such waiver is made it is continuous, unless by its terms it is limited to a specified time. There was no such limitation in the waiver of the defendants. We, therefore, hold that they are estopped from the pleading the statute of limitations in bar of plaintiff's actions.

Judgment affirmed and cause remanded for assessment of damages.[1]

ARMSTRONG *v.* LEVAN

PENNSYLVANIA SUPREME COURT, March 2, 1885

[*Reported in* 109 *Pennsylvania,* 177]

Mr. Justice PAXON delivered the opinion of the court, October 5, 1885.

The defendant below was sued for breach of official duty as pro-

[1] As to the time when a new promise must be made to be effectual, see 1 Williston, Contracts, §§ 163, 183.

thonotary in not properly entering a judgment, by means whereof its lien was postponed and the plaintiff suffered a loss.

The defendant pleaded the general issue and the Statute of Limitations. To meet the plea of the statute the plaintiff called a witness, who testified as follows: "After I discovered that there was no judgment in favor of Hannah Levan against Enoch Rohrbach, but there was one against Enoch Rothenberger, which I knew from the number to be meant as the one against Rohrbach, I went to see Mr. Armstrong in reference to the matter. I said to him that he had made this mistake, or if not he, his clerk, and that unless this matter was fixed up, I would be obliged to sue. He then made the remark that he would have to see his lawyer first, Mr. Reber. On the afternoon of the same day, I think it was, he came to my office, alone that time, and he said that I should see Mr. Reber; and I said to him again what I said in the morning in reference to suing. He said that I should not sue; that if Mrs Levan suffered any loss by reason of this mistake, he would make it good to her; that she should not lose anything through his mistake. That was in the spring of 1879, I think during the first days of April."

The court below held that this evidence, if believed by the jury, was sufficient to bar the running of the statute; and that the six years would only commence to run from the date of such promise.

The plaintiff in error has given us an elaborate argument to show that a promise to pay after the statute has run will not revive a tort, and has cited numerous authorities in support of this proposition. We concede his law to be sound; his authorities fully sustain his point.[1] The difficulty in his way is they do not meet his case. It was not the question of the revival of a tort by a promise to pay made after six years. The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise; if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit, with what grace can the defendant now set up the statute? The promise operated not to revive a dead tort, but as by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it; she has been misled to her injury; but for the defendant's promise she would have commenced her action before the six years had expired. We think the learned judge below was right in holding that the six years would only commence to run from the date of the promise.

The defendant's fourth point called upon the court to instruct the jury that under the pleadings and the evidence in this case the

[1] See 1 Williston, Contracts §186. A new promise can revive from the bar of the Statute of Limitations only a right of action in assumpsit, *id.* § § 187, 188. Indeed, according to the English authorities only a right of action in general or *indebitatus* assumpsit. Darley & Bosanquet's Statutes of Limitations (2d ed.), 105. See Wetzell *v.* Bussard, 11 Wheat, 309, 316.

verdict should be for the defendant. This the court declined to do. It was urged in support of this point that the record testimony established the fact that the plaintiff's judgment was properly entered in the judgment docket although erroneously indexed in the judgment index; and that the subsequent Singmaster judgment, therefore, acquired no prior lien, notwithstanding the finding and decision of the auditor.

This is to ask us to overrule the auditor and court below upon the question of distribution, arising in another and distinct proceeding. We find no trace in this record that any such question was made in the court below. The learned judge makes no reference to it, and no such specific point was put to the court. That question has been settled by a court of competent jurisdiction, and it shows that the plaintiff has lost a portion of her money by reason of the defendant's mistake. This is sufficient to entitle her to recover.

Judgment affirmed.

Mercur, C. J., and Gordon, J., dissented.[1]

THOMAS C. GILLINGHAM *v.* THOMAS W. BROWN

Supreme Judicial Court of Massachusetts, November 14, 1900–April 3, 1901

[*Reported in* 178 *Massachusetts,* 417]

Hammond, J. This is an action upon a demand note dated October 22, 1872. At the trial, the plaintiff, in order to meet the defence of the Statute of Limitations, proved that the defendant delivered to the agent of the plaintiff in April, 1898, $5; and the chief question was whether this money was delivered in part payment of the note, and, if so, whether under the circumstances it had the effect of making the defendant liable to pay the remainder of the note at once, or only by instalments.

The plaintiff's evidence tended to show that in February, 1898, the defendant orally agreed to pay the note in monthly instalments of $10 each, the first instalment to be paid on the first of the following month; that, the defendant failing to pay as promised, the plaintiff's sister as his agent called upon the defendant and demanded payment "of the ten dollars," or a payment "on account of the note"; that the defendant said he could not pay $10, but would pay her $5, and did so, and the payment was indorsed on the note.

The defendant admitted giving the agent the $5, but testified that "it was an act of charity" and that it was done "to get rid of her," and that in giving it he stated that it was not on account of the

[1] Renackowsky *v.* Board of Water Commissioners, 122 Mich. 613, *acc.* See further 1 Williston, Contracts, § 139.

note; and he denied that he ever agreed to pay in monthly instalments.

In this state of the evidence the defendant asked the court to rule that if the jury should find that the defendant agreed to pay the note only in instalments of $10 per month, and that the payment of the $5 was given and taken in pursuance thereof, the plaintiff could only recover the instalments due to the date of the writ. The court declined so to rule, and instructed the jury in substance that if the defendant made this payment on account of the note their verdict should be for the plaintiff for the amount of the note and interest from the date of demand, after deducting the payments indorsed on the note. To the refusal to rule as above requested and to the ruling given the defendant excepted. The jury found for the plaintiff in the sum of $1,049.40.

The verdict shows that the jury found that the $5 was paid by the defendant on account of the note and not as an act of charity as he contended. But it does not settle the question whether it was paid in pursuance of an agreement to pay on instalments, or upon the note generally without reference to that agreement; and, since the evidence would warrant a finding either way on that question, it is plain that if it was material it should have been submitted to the jury.

The St. 21 Jac. I. c. 16, in which first appears a limitation as to the time of bringing personal actions, and upon which are modelled the various Statutes of Limitation in the United States, expressly provides that all such actions should be brought within the times therein prescribed; and it makes no mention of the effect of a new promise, acknowledgment or part payment. In every form of action but that of assumpsit, the construction has been in unison with the express words of the statute, but, as to that action, the statute has had a varied experience in running the gauntlet of judicial exposition. There was early read into it a provision that in an action of assumpsit a promise of payment within six years prior to the action would avoid the statute, but that a confession, or simple acknowledgment by the debtor that he owed the debt would not be sufficient. Dickson *v.* Thomson, 2 Show. 126. At a later period, however, it was held that an acknowledgment was evidence from which a jury might properly find a new promise to pay. Heyling *v.* Hastings, 1 Ld. Raym. 421; S. C. Comyns, 54. Still later, Lord Mansfield said in Quantock *v.* England, Burr. 2628, that the statute did not destroy the debt, but only took away the remedy; and that if the debt be older than the time limited for bringing the action the debtor may waive this advantage, and in honesty he ought not to defend by such a plea, "and the slightest word of acknowledgment will take it out of the statute." In Tanner *v.* Smart, 6 B. & C. 603, however, the pendulum swung the other way, and Lord Tenterden, C. J., after saying that there were undoubtedly authorities to the

effect that the statute is founded on a presumption of payment, that whatever repels that presumption is an answer to the statute, that any acknowledgment which repels that presumption is in legal effect a promise to pay the debt, and that, though such acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law considers the condition or refusal void, and the acknowledgment itself an unconditional answer to the statute, proceeds in an able opinion to say in substance that these cases are unsatisfactory and in conflict with some others, and that the true doctrine is that an acknowledgment can be an answer to the statute only upon the ground that it is an evidence of a new promise, and that, while, upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied, yet, where a debtor guards his acknowledgment and accompanies it with a declaration to prevent any such implication, a promise to pay could not be raised by implication. This is a leading case in England on this subject.

In this country, it has very generally been held that the Statute of Limitations is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of things may have been forgotten, or may be incapable of explanation by reason of the loss of evidence, that if a new express promise be set up in answer to the statute, its terms ought to be clearly proved, and that, if there be no express promise, but a promise is to be raised in law from the acknowledgment of the debtor, such an acknowledgment ought to contain an unqualified admission of a previous subsisting debt for which the party is liable and which he is willing to pay. It follows that if the acknowledgment be accompanied by circumstances, or words, which repel the idea of an intention to pay, no promise can be implied. Bell *v.* Morrison, 1 Pet. 351; Jones *v.* Moore, 5 Binn. 573; Berghaus *v.* Calhoun, 6 Watts, 219; Sands *v.* Gelston, 15 Johns. 511; Danforth *v.* Culver, 11 Johns. 146; Purdy *v.* Austin, 3 Wend. 187. In this last case the court say that the statute is one of repose and should be maintained as such; that, while the unqualified and unconditional acknowledgment of a debt is adjudged in law to imply a promise to pay, the acknowledgment of the original justice of the claim without recognizing its present existence is not sufficient; and that anything going to negative a promise or intention to pay must be regarded as qualifying the language used.

This doctrine was approved by this court in the leading case of Bangs *v.* Hall, 2 Pick. 368, in which Putnam, J., after a review of the authorities, says: "On the whole, we are satisfied that there must be an unqualified acknowledgment, not only that the debt was just originally, but that it continues to be so, . . . or that there has been a conditional promise which has been performed, as is before explained."

To answer the statute there must be a promise express or implied from an acknowledgment of the debt as a present existing debt. If the promise whether express or implied be conditional, it must be shown that the conditions have been fulfilled. Cambridge *v.* Hobart, 10 Pick. 232; Sigourney *v.* Drury, 14 Pick. 387; Krebs *v.* Olmstead, 137 Mass. 504.

While the original debt is the cause of action, Ilsley *v.* Jewett, 3 Met. 439, the liability of the debtor is determined not by the terms of the old but by those of the new promise. As stated by Vice Chancellor Wigran in Phillips *v.* Phillips, 3 Hare, 281, 300, "The new promise, and not the old debt, is the measure of the creditor's right. . . . If the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." Custy *v.* Donlan, 159 Mass. 245; Boynton *v.* Moulton, 159 Mass. 248.

Pub. Sts. c. 197, § 15, provides that no acknowledgment or promise shall be evidence of a new or continuing contract to take the case out of the operation of the statute, unless contained in some writing signed by the debtor, and in § 16,[1] that nothing in this provision shall be taken to alter, take away or lessen the effect of a part payment of principal or interest; and it may be contended that the effect of these two sections is to exclude all parol evidence whatever bearing upon an acknowledgment or new promise by part payment or otherwise, whether the creditor be attempting to avail himself of it for attack, or the debtor for defence. But that does not seem to us to be the result. The language is that the provision of the fifteenth section shall not be taken to alter, take away or lessen the effect of part payment. But what was the effect of part payment before this statute requiring the promise or acknowledgment to be in writing? Its effect depended upon the circumstances. If a debtor made a part payment as such, it was considered as an acknowledgment that the whole debt was due, otherwise it could not be a part payment; and so it stood upon the same footing as any other unconditional acknowledgment, and from it the law, in the absence of anything to the contrary, implied a promise to pay the whole. It had no validity to answer the statute except as an acknowledgment of the debt. In the language of Tindal, C. J. in Clark *v.* Hooper, 10 Bing. 480, in the mind of the party paying such a payment must be "a direct acknowledgment and admission of the debt, and is the same thing in effect as if he had written in a letter to a third person that he still owed the sum in question."

But suppose a debtor says to his creditor "I acknowledge the debt to be just, that it never has been paid, and that I have no defence except the Statute of Limitations. I am willing to pay and I do hereby pay to you one-half of the debt, but I do not intend to

[1] As to the statutes requiring a writing to make valid a new promise to pay a debt barred by the Statute of Limitations, see 1 Williston Contracts, § 164.

waive the statute as to the rest. On the contrary I insist on my defence as to that, and I never will pay any more." Can it be said that from such a part payment, accompanied by such a distinct affirmation of the debtor's intention not to pay more but to insist upon his defence under the statute, the law would have implied a promise to pay the remaining half?

Again, suppose a debtor says to his creditor, "Your claim against me is just, it never has been paid, and my only defence to it is the Statute of Limitations. I am not able to pay it now, but I will pay it when and as fast as I am able, but I will not pay in any other way, and I insist upon my defence under the statute except so far as I now waive it. I am able to pay and I do now pay you ten dollars with this understanding." Can it be said that from such a part payment the law would have implied a promise to pay the debt according to its original terms?

To come a little more closely to what the jury might have found the facts to be in this case, suppose the debtor agrees to pay in instalments and in no other way, and clearly declares his intention to pay in no other way, and then makes a payment in compliance with the new promise. Can it be said that from such a part payment the law would have implied a promise to pay the debt in any other way? Such an interpretation of the words and act of the debtor would be inconsistent with the understanding of both parties, and would be unreasonable and unjust.

Such a partial payment as that named in either of the three cases above supposed must be construed as a conditional and not an absolute waiver. The waiver must be taken as it is, absolute if absolute, conditional if conditional. And on principle that must be so, whether it be found in a verbal promise or in a payment. There is no ground for a satisfactory distinction between a waiver by word and a waiver by an act. Each is evidence of a new promise and operative only as such; and while the cause of action is the old promise, the measure of the liability is determined by the new one.

Now it is expressly declared in Pub. Sts. c. 197, § 16, that the provisions of the preceding section shall not be taken to alter, take away or lessen the effect of a part payment. There can be no doubt that prior to the passage of the law contained in § 15 a partial payment made in pursuance of an agreement to pay by instalments did not have the effect of making the debtor liable in any other way. To say that the provisions of § 15 do have that effect is to alter the effect of such a part payment, and so is inconsistent with § 16. The law with respect to part payment is to remain as before, and the language accompanying the payment is admissible to show the intent with which the payment is made, just as it was admissible before, and that is so whether or not it contains a promise to pay upon which the creditor could have maintained an action prior to the requirement that it should be in writing.

In the case at bar there was evidence tending to show that the defendant had orally agreed to pay in monthly instalments of $10 each, and if such an agreement had been in writing it could have been enforced according to its terms, but the right of the creditor as against a plea of the statute would have been measured by this new promise; and, even if the debtor had failed to pay, the creditor could recover only the instalment due under the terms of the agreement; and that would be so even if the defendant had made several of the payments. The creditor could take the money under the terms which the debtor had prescribed, and upon no other.

And by the reason of the thing the same principle must apply where the payment is made upon an agreement which, not being in writing, could not be enforced. If this $5 was paid in part performance of his agreement to pay by instalments, then it cannot be inferred that he intended to recognize the existence of the old debt as an actual subsisting obligation in any other way. The nature of the act is to be determined by the intention of the debtor as shown by the act, his words, and the circumstances accompanying and explaining it. Taylor *v.* Foster, 132 Mass. 30; Roscoe *v.* Hale, 7 Gray, 274. See also 13 Am. & Eng. Encyc. of Law, 750 *et seq.*, for a good collection of the cases.

While in this case the evidence is conflicting, we think it would warrant a finding that the only express promise made by the defendant was to pay in monthly instalments of $10 each, and that he paid the $5 solely under that agreement. If that was so, then no other promise can be inferred from this payment, and the instruction requested should have been given. *Exceptions sustained.*[1]

BIG DIAMOND MILLING COMPANY *v.* CHICAGO, MILWAUKEE & ST. PAUL RY. COMPANY

MINNESOTA SUPREME COURT, April 11, 1919

[*Reported in* 171 *Northwestern Reporter*, 799]

HALLAM, J.[2] This is an action to recover excessive freight charges demanded by the defendant and paid by the plaintiff. The validity of the charges depended on certain questions then pending before the United States Supreme Court. Under the decision of that court the plaintiff became entitled to recover the charges if its action was seasonably brought.

The action was not begun until after the statutory period had expired since the freight in question was paid; but within the

[1] See also Strong *v.* Andros, 34 App. D. C. 278; Galvin *v.* O'Gorman, 40 Mont. 391; Equitable Trust Co. *v.* MacLaire, 77 N. Y. Misc. 116.

[2] The statement of facts is abbreviated and a portion of the opinion omitted.

statutory period the defendant had issued a statement "to the public" which was signed by the Minnesota railroad commission, and by all the railroads interested, including the defendant. In this statement it was said that "properly supported claims" would be paid by the railroad companies.

The question is, does this constitute a new promise sufficient to remove the bar of the Statute of Limitations? The trial court held not. In our opinion this was an error.

One reason urged in support of the court's ruling is that the writing does not identify the plaintiff's claims and promise to pay them. It must, of course, do so in order to constitute a "new promise." Russell & Co. *v.* Davis, 51 Minn. 482, 53 N. W. 766; Anderson *v.* Nystrom, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320, 14 Ann. Cas. 54. But specific reference to a particular claim is not necessary. If the language would be sufficiently specific in a bond to pay claims, surely it is sufficient in a new promise by the debtor. A general admission of unsettled matters of account between the parties is not sufficient. Conway's Ex'r *v.* Reyburn's Ex'r, 22 Ark. 290, 292. But if the general language refers, with certainty, to the debt, that is sufficient. A promise to pay "every cent he owed him," it is held, sufficiently identifies the debt sued on. O'Hara *v.* Murphy, 196 Ill. 599, 63 N. E. 1081. It is not necessary that the new promise should state the amount of the debt. Conway's Ex'r *v.* Reyburn's Ex'rs, 22 Ark. 290; First Nat. Bank *v.* Woodman, 93 Iowa, 668, 62 N. W. 28, 57 Am. St. Rep. 287; Wetz *v.* Greffe, 71 Ill. App. 313; Kincaid *v.* Archbald, 73 N. Y. 189, 192; Abrahams *v.* Swann, 18 W. Va. 274, 280, 41 Am. Rep. 692. Nor even that the amount should have been fixed. "We owe you for three years' salary" is held sufficient though the salary had never been fixed. Schmidt *v.* Pfau, 114 Ill. 494, 502, 2 N. E. 522, 527. An admission of some balance due, the amount to be ascertained by arbitration, is held sufficient. Cheslyn *v.* Dalby, 10 L. J. Exch. 4. A promise to pay if the debt is established is held a good new promise. Stanton *v.* Stanton, 2 N. H. 425; Shay *v.* Lambert, 14 App. Div 265, 43 N. Y. Supp. 470; Read *v.* Wilkinson, 20 Fed. Cas. 359, No. 11,611; Haplin *v.* Haftings, 12 Mod. 223. So is a promise to pay if the debtor cannot prove payment. Richmond *v.* Fugua, 33 N. C. 445; Sweet *v.* Hubbard, 36 Vt. 294; Sothoron *v.* Hardy, 8 Gill. & J. (Md.) 133. And a prediction that nothing will be found due, it is held, does not vitiate the promise. 25 Cyc. 1343; Bliss *v.* Allard, 49 Vt. 350; Read *v.* Wilkinson, 20 Fed. Cas. 359, No. 11,611.

A promise to pay all claims of a definite class is in our opinion sufficiently definite. The language of the letter "to the public" promising to pay *all* claims of the class to which plaintiff's claims belong sufficiently identified plaintiff's claims. This is in

accordance with the decision of the Washington Supreme Court, in Belcher *v.* Tacoma Eastern R. Co., 99 Wash. 34 168 Pac. 782, a case so similar to this one that, as to matter of identification of the claim, we cannot distinguish it.

MARRECO and Others *v.* RICHARDSON

In the Court of Appeal, May 14, 15, 1908

[*Reported in* (1908) 2 *K. B.* 584]

The defendant, being indebted to his solicitor in respect of a bill of costs, handed him on May 10, 1900, a cheque in part payment of the bill; at the same interview it was verbally agreed between the parties that the cheque should not be presented for payment before June 20. On June 20 the cheque was presented for payment at the defendant's bankers, and was duly paid. On June 18, 1906, the executors of the solicitor, who had meanwhile died, issued the writ in the present action to recover the balance of the debt upon the bill of costs: —

Fletcher Moulton, L. J. The facts of this case are curious, but I have no doubt that the decision of Bray J. was correct. It was very early recognized by the Courts that a clear acknowledgment of the existence of a debt was an act from which a fresh promise to pay the debt might be implied, the consideration being the then existing liability to pay it. Such a promise might be proved in any way in which a promise is capable of being proved; it might be in writing, it might be oral; it might be inferred or implied from the conduct of the parties. This state of the law was found to lead to abuse, and Lord Tenterden's Act was passed, which provided that an acknowledgment or promise to pay, in order to take a case out of the Statute of Limitations, must be in writing, with the striking limitation, however, that nothing should affect the consequences arising from part payment of a debt. There is no doubt that this exception arose from the fact that the Courts had been in the habit of giving special recognition to payment of part of a debt on account of the whole as being conduct which might well amount to a recognition of the debt and enable the Courts to infer a fresh promise to pay the remainder. Lord Tenterden's Act therefore left the existing decisions as to the effect of part payment of a debt untouched. These decisions make it clear that part payment by itself, and apart from the circumstances under which it is made, does not necessarily carry with it a promise to pay the remainder; the part payment must be made under circumstances from which a promise to pay the remainder can be inferred. It is evident that the circumstances surrounding a part payment may be such as to make it ineffectual as a new promise. If the debtor were to say "Take

that, it's all you'll get," the language accompanying the payment would clearly negative any promise by him to pay the remainder of the debt.

The Courts have loyally administered Lord Tenterden's Act, but in one respect they have enlarged the effect of the proviso. They have held that the delivery of a negotiable instrument by a debtor to his creditor in part discharge of the debt is equivalent to part payment. Therefore where delivery of a negotiable instrument is made under circumstances from which there can be implied a promise to pay the remainder of the debt the case is taken out of the Statute of Limitations.

The present case is an instance of this, and when we once realize that in such a case the principle of law still survives that there may be an effective acknowledgment of a debt by conduct, any apparent difficulties in this case disappear. When was the act done from which the promise to pay the remainder of the debt may be implied? Beyond question, it was when the cheque for 20*l.* was given in part payment of the original debt; and if in this case the six years from the original creation of the debt had expired the day after the cheque was given, the giving of the cheque would take the case out of the statute, and accordingly the debt might have been sued for at any time within six years from the date of the cheque. But in this case the period of six years from the date of the cheque had expired before this action was brought, and it is now urged by the plaintiffs that, because by arrangement between the parties the cheque was not presented for payment for several weeks after it was given to the creditor, it must be taken that when the cheque was in fact paid it operated on that date as a part payment of the debt. In one sense that is true, for the 20*l.*, when paid on June 20, went towards the extinction of the debt; but that payment was only the honoring of the cheque which had been given some weeks before. The only conclusion I can draw from the facts is that on June 20 the defendant fulfilled his obligation to pay the cheque—I cannot infer from that act any promise made by him on that day to pay the remainder of his debt. Suppose that on May 10 the defendant had given a promissory note payable three months after date, payment could clearly not be enforced for three months;—that would be a stronger case for the plaintiffs than the present one — there can be no doubt that payment of the note at the due date would be nothing more than a discharge of the obligation entered into when the note was actually made. There would not be in that case, and there is not in the present case, any fresh act or conduct from which we could infer that the debtor was promising to pay the remainder of the debt, or was doing anything more than carrying out his obligation of honoring the negotiable instrument which he had given. The result is that there is only one act and one moment of time which can be looked at here in determining whether there has been

a renewal or a prolongation of the period within which this action could be brought, and that is the giving of the cheque on May 10; but that was more than six years before the commencement of this action, and it is therefore statute-barred.[1]

THE SECURITY BANK OF NEW YORK, Appellant, *v.* HERMAN FINKELSTEIN, Respondent

New York Supreme Court, Appellate Division
December 31, 1913

[*Reported in* 160 *New York Appellate Division,* 315]

Laughlin, J.: This is an action on a promissory note made by the defendant on the 3d day of January, 1906, for $2,005.35, payable on demand to the order of the plaintiff under its former name, which was the Fourteenth Street Bank, with interest, to recover a balance of $375.67. The action was commenced on the 19th day of February, 1912. It is alleged that there were payments made to apply on the note as follows: January 8, 1906, $502.67; June 13, 1906, $751.34, and March 28, 1907, $375.67. The allegations with respect to these payments were put in issue by the answer in which the Statute of Limitations was also pleaded. The payments made, which were thus put in issue, were dividends received by the plaintiff from the receiver of the Cooper Exchange Bank, under an assignment, as collateral security for the note, of defendant's claim against said bank as a depositor.

The defendant's note to the plaintiff authorized the payee to appropriate and apply on the defendant's indebtedness the collateral securing the note, if the defendant should make default; and the note contained further an express promise by the defendant to pay any deficiency. The question presented by the appeal is whether the last payments made on the note give rise by implication of law to promises then made by the defendant to pay the balance of his indebtedness.

The effect, on the running of the Statute of Limitations, of the payment of principal or interest is declared by judicial decisions, but there is no statutory provision governing it. The only statutory reference to it is contained in section 395 of the Code of Civil Procedure, which is as follows: "An acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of prin-

[1] The statement of facts is abbreviated. Sir Gorell Barnes, President, and Farwell, L. J. delivered concurring opinions.

cipal or interest." By judicial decisions a rule, doubtless now as binding as a statutory enactment, has been declared to the effect that a payment of either principal or interest made by the debtor gives rise to an implied promise, or justifies an inference of a new promise, on his part made at that time, in the absence of evidence showing that he disclaimed the intent to have his act given that effect, to pay the balance of the indebtedness; and that the Statute of Limitations from that time commences to run on the new promise renewing the contract. (Murdock *v.* Waterman, 145 N. Y. 55; Harper *v.* Fairley, 53 id. 442; Smith *v.* Ryan, 66 id. 352; Pickett *v.* Leonard, 34 id. 175.)

So rigidly have the courts adhered to the underlying reason for this rule that it has been repeatedly held that a payment by one, jointly or otherwise liable with others on the same instrument, even with the knowledge of the others liable thereon and whose liability is thus reduced, suspends the running of the Statute of Limitations only as against himself. (Hoover *v.* Hubbard, 202 N. Y. 289; Murdock *v.* Waterman, *supra;* Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75; McMullen *v.* Rafferty, 89 id. 456; Harper *v.* Fairley, *supra.*) The only exceptions to the rule that a payment, in order to prevent the running of the statute, must be made by the debtor, who pleads the statute, are, where the payment is made by his authorized agent clothed with sufficient authority to disclaim for him any intention to have the effect given the payment which by legal inference or presumption would otherwise attach thereto and he fails to so disclaim; or where he ratifies a payment made in his behalf. (Pickett *v.* Leonard, *supra;* Harper *v.* Fairley, *supra;* Smith *v.* Ryan, *supra;* Murdock *v.* Waterman, *supra.*) It is well settled that where the debtor assigns collateral as security for his note or other obligation, his debtor, in making a payment to the assignee on the obligation thus assigned, is not his agent, and that such a payment does not give rise to a new promise on the part of the debtor (Harper *v.* Fairley, *supra;* Smith *v.* Ryan, *supra;* Acker *v.* Acker, 81 N. Y. 143); and the same has been held with respect to payment by a general assignee for creditors. (Pickett *v.* Leonard, *supra.*) It has also been held that the creditor in selling and applying the proceeds of collateral to the payment of the obligation is not the agent of the debtor for this purpose. (Brooklyn Bank *v.* Barnaby, 197 N. Y. 210.) In view of these authorities it requires no further argument to show that the receiver of the Cooper Exchange Bank in paying the dividends was not the agent of the defendant, and that there is no legal presumption or inference to be drawn from such payments that a new promise was then and there made by the debtor to pay the balance owing on the note. Nor can it be successfully contended that the plain-

tiff itself was the defendant's agent in collecting and applying the dividends. The plaintiff in collecting the dividends acted for itself pursuant to the rights derived by it under the assignment. There was no act involved in the collection or application of the dividends to the payment of the note that it was necessary to perform in the name of the defendant. The money when received became the property of the bank so far as required in paying the note. Its application to the payment of the note was a mere mental operation or bookkeeping entries which the officers of the plaintiff performed in its behalf and for it.

It cannot be said as matter of law that defendant ratified the payments as made or applied on the note by the bank so that they are to be regarded the same as if he brought the money in and paid it over the counter. The question of ratification was submitted to the jury as a question of fact and was found by them adversely to the appellant. We would not be justified in disturbing the verdict on that point unless as matter of law the evidence shows a ratification. The defendant was not consulted with respect to the appropriation of the dividends to the payment of the note. He was merely informed that the dividends had been received and so applied. He had no voice in the matter and he had no standing to question the right of the plaintiff to make the application. He was not called upon to protest against the doing of that which plaintiff had a right to do; nor was he since the *act* was not his, required to *disclaim* its effect on the Statute of Limitations or with respect to a new promise.

The only debatable point is whether the plaintiff is entitled to recover on the theory that the note itself or the assignment contains a promise, separate and apart from the promise contained in the note proper, to pay any deficiency arising after the application of the moneys received under the assignment. In Brooklyn Bank *v.* Barnaby (*supra*) the Court of Appeals had this question under consideration in an action on a note in substantially the same form as that in the case at bar, and the collateral was sold and the proceeds applied thereon. There the deficiency could not be ascertained until the sale of the collateral and on that ground three of the judges maintained that a cause of action on the promise to pay the deficiency did not arise until the deficiency was known; but the majority of the court decided otherwise, and that decision is controlling on this court on that proposition.

I am also of opinion that the action cannot be maintained on the theory of a promise contained in the assignment to pay the deficiency. The action is upon the note and not on the assignment. This provision of the assignment is not set forth in the complaint. It would now be too late, if the attempt were made — but it is not by counsel for appellant — to read

it into it now, for the action evidently was not tried on that theory and the proof is not sufficient to show that no more could have been realized under the assignment, nor does it appear but that there might have been some other defense had the action been on the assignment. However, it would seem doubtful whether the action, if properly brought on the assignment, could be sustained on that theory. In Brooklyn Bank *v.* Barnaby (*supra*) it does not appear that there was a separate formal assignment such as in the case at bar. On the theory upon which that case was decided, however, I am of opinion that the separate assignment does not materially distinguish the case at bar from it. The court there held that there was but one promise and that was the promise in the note proper to pay the indebtedness, and that the promise to pay the deficiency had reference to the unconditional promise to pay the indebtedness and was to be so construed. These views require an affirmance.

It follows that the determination should be affirmed, with costs.

McLaughlin and Dowling, JJ., concurred; Ingraham, P. J., and Hotchkiss, J., dissented.

BUSH *v.* STOWELL, et al.

Supreme Court of Pennsylvania, March 11, 1872

[*Reported in* 71 *Pennsylvania,* 208]

This was an action brought May 22, 1865, on a promissory note made jointly by the four defendants, payable in four instalments; the first of which was due June 1, 1865, and the others in three successive years on the first of June. Indorsements of partial payments were made on June 4, 1856, and on May 3, 1862. This last payment was made by one of the defendants, Hezekiah Stowell. D. A. Stowell, another of the defendants, according to the plaintiff's evidence, had made a new promise in 1867 to pay the debt. The jury found a verdict for the full amount unpaid on the note against the defendant who had made the payment in 1862 and the defendant who had made the new promise. Against the other two defendants a verdict was given for the single instalment of the note on which the Statute of Limitations had not run at the time of bringing the action.

On exception to the judge's charge, the plaintiff took out a writ of error.[1]

Sharswood, J. — Lord Coke announced the distinction between actions of debt and of covenant or assumpsit upon an agreement to pay a sum of money by instalments, which has been recognized and followed since: "If a man be bound in a bond or by contract

[1] The statement of facts has been abbreviated.

to another to pay a hundred pounds at five several days, he shall not have an action of debt before the last day be passed." "But if a man be bound in a recognizance to pay a hundred pounds at five several days, presently after the first day of payment he shall have execution upon recognizance for that sum, and shall not tarry till the last be past, for that it is in the nature of several judgments." "And so it is of a covenant or promise, after the first default an action of covenant or an action upon the case doth lie, for they are several in their nature." Co. Litt. 292 b. Lord Loughborough reviewed all the law on this subject in Rudder *v.* Price, 1 H. Bl. 547, in which it was held that an action of debt will not lie on a promissory note, payable by instalments, till the last day of payment be past. He shows that prior to the case of Cooke *v.* Whorwood, 2 Saund. 337, it was the uniform course where an action of assumpsit was brought before all the instalments were due, to allow a recovery in damages for those still to accrue and come due, upon the notion that after a judgment on the contract no further recovery could be had: Beckwith *v.* Nott, Cro. Jac. 504; Peck *v.* Ambler, Dyer 113 and note; Milles *v.* Milles, Cro. Car. 241. But in Cooke *v.* Whorwood, which was assumpsit to perform an award to pay money in instalments, it was objected that all the days of payment were not past; but the Court of King's Bench, Sir Matthew Hale being then Chief Justice, was clear that the action might be brought for such money only as was due at the time of bringing the action, and the plaintiff could recover damages accordingly; and when another sum of the money awarded should become due, the plaintiff might commence a new action for that also, and so *toties quoties.* The law must be now considered as settled in conformity to this doctrine: Tucker *v.* Randall, 2 Mass. 283; Greenleaf *v.* Kellogg, Id. 568; Cooley *v.* Rose, 3 Id. 221.

If then the plaintiff could have maintained a suit for the first instalment in this case immediately after it fell due, his cause of action then accrued, and the Statute of Limitations began to run. It is unnecessary to inquire what the law would have been if this had been an action of debt, and the plea *actio non accrevit infra sex annos;* for, as we have seen, an action of debt could not have been maintained on this promissory note until after all the instalments had fallen due. But being assumpsit, there would seem to be no question that, as to the first instalment, the action was barred: Burnham *v.* Brown, 23 Me. 400; 2 Pars. on Cont. 373.

Nor is it any longer open to question that a payment on account or an acknowledgment by one of two or more joint debtors will not take the case out of the statute as to the others: Coleman *v.* Fobes, 10 Harris 156; Levy *v.* Cadet, 17 S. & R. 126; Searight *v.* Craighead, 1 Penna. Rep. 135; Houser *v.* Irvine, 3 W. & S. 345; Schoneman *v.* Fegley, 7 Barr 433.

What, then, is the effect of this rule when applied in a joint action against several joint debtors? Certainly not that it shall sever the judgment, which in a joint action *ex contractu* would be an anomaly. In such a proceeding if evidence is offered of an acknowledgment or payment by one only of the defendants, it is strictly inadmissible, unless indeed offered to be followed by a similar acknowledgment or payment by the others, which would be sufficient to take the case out of the statute as to all. It follows that in this case the jury should have been instructed to find for the plaintiff as against all the defendants only the amount of the second instalment and interest. Whether the plaintiff could maintain an action against those not affected by the bar of the statute in consequence of their acknowledgment or payment for the first instalment, need not now be discussed, nor on what principle contribution between the joint debtors is to be regulated. Sufficient for the day is the evil thereof. Upon a writ of error by the defendants, the verdict and general judgment entered on the verdict could not have been sustained. It is in effect several judgments in a joint action. We must assume that the defendants acquiesce, as they do not complain. But what injury has been done to the plaintiff in error? He has in his joint action, by the verdict and judgment below, all the benefits which he could possibly have attained had he brought several actions against each defendant. It would evidently be an injury to him to reverse his judgment, and send the case back for another trial, which must result in a verdict and judgment against all for the less sum, leaving the plaintiff to pursue his separate remedies against those as to whom the bar of the statute is saved. *Judgment affirmed.*

THOMPSON, C. J. — As applicable to the case in hand, I dissent.

CHAPTER II

FORMATION OF CONTRACTS UNDER SEAL

SECTION I

FORMALITIES OF EXECUTION

TAUNTON *v.* PEPLER

IN CHANCERY, 1820

[*Reported in* 6 *Maddock,* 166]

THE bill was filed by the next of kin, against the defendant, as administrator of the intestate, for an account.

The defendant pleaded a release.

Mr. *Phillimore* objected to the plea of the release; first, because it was founded only on the receipts of the administrator, as they then stood; and, secondly, because the release was only said to be "sealed and delivered," without also saying "signed;" and cited Blackstone,[1] who says a deed must be signed as well as sealed and delivered.

Mr. *Koe,* contra.

The VICE-CHANCELLOR. The release states that the administrator had received *all* the property belonging to the intestate; I cannot therefore assume that he has received anything since. There is no authority for saying that a release, to be effectual, must be signed as well as sealed and delivered. *The plea must be allowed.*[2]

STONE *v.* BALE

COMMON PLEAS, 1693

[*Reported in* 3 *Levinz,* 348]

DEBT on obligation, and declares, that March 20, 34 Car. 2, the defendant by obligation dated October 10, 33 Car. 2, *sed primo deliberat'* 20 March, 34 Car. became bound, etc. The defendant pleads, that upon the said tenth of October, when the obligation bears date, there was no such person *in rerum natura* as the plaintiff. To

[1] Blackstone's Com. 305; Blackstone's words are: "It is requisite that the party whose deed it is should *seal; and now, in most cases, I apprehend, should sign it also.*"

[2] Cromwell *v.* Grunsden, 2 Salk. 462; Jeffery *v.* Underwood, 1 Ark. 108, *acc.* See also Cooch *v.* Goodman, 2 Q. B. 597; Shepp. Touch. (Preston's ed.), 56 *b.*

which the plaintiff demurs: and now upon argument it was adjudged by the whole court for the plaintiff: they agreed where the plaintiff declares on a date he cannot afterward reply that it was *primo deliberat'* at another day; for that would be a departure, and so are the books to be intended, Co. 2 Rep. 4 b, and 1 H. 6, 1 b, there cited; for *prima facie* every deed is supposed to be made the same day that it bears date. But where the date is mistaken, the party may declare, or in his first plea plead, that by a deed bearing date such a day, but *prima deliberat'* at another day, the party granted, or became bound, etc. For God forbid, when a deed is duly made that by negligence or mistake of the clerk in writing the date, the party should lose the whole benefit of the deed, and be without remedy; and so are Dy. 307 a, 315 a; Cro. Eliz. 773, 890; 5 H. 7, 27 a, to be understood upon this difference. *Levinz* of the counsel with the plaintiff.[1]

WARREN *v.* LYNCH

New York Supreme Court of Judicature, 1810

[*Reported in* 5 *Johnson,* 239]

Kent, C. J., delivered the opinion of the Court. The two questions made upon this case are: 1. What is the legal import of the instrument upon which the suit is brought? and, 2. Was the evidence sufficient to entitle the plaintiff to recover?[2]

1. The note was given in Virginia, and by the laws of that state it was a sealed instrument or deed. But it was made payable in New York, and according to a well-settled rule, it is to be tested and governed by the law of this state. 4 Johns. Rep. 285. Independent then of the written agreement of the parties (and on the operation of which some doubt might possibly arise), this paper must be taken to be a promissory note, without seal, as contradistinguished from a specialty. We have never adopted the usage prevailing in Virginia and in some other states, of submitting a scrawl for a seal; and what was said by Mr. Justice Livingston, in the case of Meridith *v.* Hinsdale (2 Caines, 362), in favor of such a substitute, was his own opinion, and not that of the Court. A seal,

[1] Osbourn *v.* Rider, Cro. Jac. 135; Cromwell *v.* Grunsden, 2 Salk. 462; Goddard's Case, 2 Coke, 4 *b*; Hall *v.* Cazenove, 4 East, 477; Thompson *v.* Thompson, 9 Ind. 323; Lee *v.* Mass. Ins. Co., 6 Mass. 208, 219; Banning *v.* Edes, 6 Minn. 402; Jackson *v.* Schoonmaker, 2 Johns. 230; Geiss *v.* Odenheimer, 4 Yeates, 278; Swan *v.* Hodges, 3 Head, 251; McMichael *v.* Carlyle, 53 Wis. 504, *acc.*

But the execution is presumed in the absence of evidence to the contrary to have taken place on the day a deed is dated. Oshey *v.* Hicks, Cro. Jac. 264; Savery *v.* Browing, 18 Ia. 246; Lyon *v.* McIlvaine, 24 Ia. 9; McConnell *v.* Brown, Litt. Sel. Cas. 459; Banning *v.* Edes, 6 Minn. 402; Colquhoun *v.* Atkinsons, 6 Munf. 550; Raines *v.* Walker, 77 Va. 92; Wheeler *v.* Single, 62 Wis. 380. See also Anderson *v.* Weston, 6 Bing. N. C. 296.

[2] Only so much of the opinion as relates to the first question is reprinted.

according to Lord Coke (3 Inst. 169), is wax with an impression. *Sigillum est cera impressa, quia cera sine impressione non est sigillum.* A scrawl with a pen is not a seal, and deserves no notice. The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. *Multum abludit imago.* To adopt it as such would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one, if it want the requisite formalities. "Notwithstanding," says Perkins (sect. 129), "that words obligatory are written on parchment or paper, and the obligator delivereth the same as his deed, yet if it be not sealed, at the time of the delivery, it is but an *escrowl*, though the name of the obligator be subscribed." I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages; but we ought to require evidence of some positive and serious public inconvenience, before we, at one stroke, annihilate so well established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President Pendleton, and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. *Ista ratio nullius pretii* (says Vinnius, in Inst. 2, 10, 5) *nam et alieno annullo signare licet.* Seals were never introduced or tolerated in any code of law, because of any family impression, or image, or initials which they might contain. One person might always use another's seal, both in the English and in the Roman law. The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practised upon the unwary. President Pendleton, in the case of Jones and Temple *v.* Logwood (1 Wash. Rep. 42), which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. "It is not requisite," according to Perkins (sect. 134), "that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors, if every one put his seal upon the same piece of wax." And Brooke (tit. Faits, 30 and 17) uses the same language. In Lightfoot and Butler's case, which was in

the Exchequer, 29 Eliz. (2 Leon, 21), the Barons were equally explicit, as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be upon several pieces of wax. Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Mr. Selden's "Notes to Fortescue" (De Land, p. 72); and the nature of a seal is no more a matter of doubt in the old English law than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall, upon this subject; for in the late case of Adam *v.* Keer (1 Bos. and Puller, 360), it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage.

The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses. *Subscriptione testium, et ex edicto prætoris, signacula testamentis imponerentur* (Inst. 2, 10, 3). The Romans generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and, according to Heineccius (Elementa juris civilis secundum ord. Inst. 497), with any other instrument, which would make an impression, and this, he says, is the law to this day throughout Germany. And let me add, that we have the highest and purest classical authority for Lord Coke's definition of a seal; *Quid si in ejusmodi cera centum sigilla hoc annulo impressero?* (Cicero, Academ. Quæst. Lucul. 4, 26).[1]

[1] In National Provincial Bank *v.* Jackson, 33 Ch. D. 1, 11, Cotton, L. J., said: "Although these instruments are expressed to be signed, sealed, and delivered in the presence of the attesting witness, who was one of R. Jackson's clerks, there is no trace of any seal, but merely the piece of ribbon for the usual purpose of keeping the wax on the parchment. In my opinion the only conclusion we can come to is that these instruments were never in fact sealed at all. They were somehow or other prepared by R. Jackson, but never in fact executed by him in such a way as to reconvey the legal estate. It is said, and said truly, that neither wax nor wafer is necessary in order to constitute a seal to a deed, and that frequently, as in the case of a corporation party to a deed, there is only an impression on the paper; and *In re* Sandilands, Law. Rep. 6 C. P. 411 was referred to, where an instrument had been forwarded from the colonies together with an official certificate of its having been duly acknowledged, and this was recognized by the Court as a deed, although there was no seal but only the ribbon on it. That case is not now under appeal, but it is evident that the question was merely as to what was the true inference of fact, and although perhaps, having regard to the certificate, it was right there to hold that the deed had been sealed, here in my opinion it would be wrong to do so. It is true that if the finger be pressed upon the ribbon that may amount to sealing, but no such inference can be drawn here where the attesting witness who has given evidence recollects nothing of the sort, and when Jackson had already committed one fraud in the matter and perhaps then

LORAH, Appellant, *v.* NISSLEY

Pennsylvania Supreme Court, 1893

[*Reported in* 156 *Pennsylvania,* 329]

Rule to open judgment entered on note alleged to be under seal. The note was in the following form:

"$200.00. "Mount Joy, Pa., August the 22, 1881.

"Five months after date I promise to pay to Jacob E. Lorah or order, at the First National Bank of Mount Joy, Two Hundred Dollars and without defalcation or stay of execution, value received. And I do hereby confess judgment for the said sum, costs of suit and release of all errors, waiving inquisition and confess condemnation of real estate. And I do further waive all exemption laws, and agree that the same may be levied by attachment upon wages for labor or otherwise.

"Witness: Henry B. Nissley, Seal.
George Shiers. Seal."

The word "seal" following the signature of the maker was printed. The Court held that the note was not under seal, and made absolute the rule to open the judgment, so as to permit defendant to plead the statute of limitations, in an opinion by McMullen, J., 1 Dist. R. 410.

Error assigned was above order.

A. S. Hershey and *B. F. Davis,* for appellant.

J. Hay Brown, W. U. Hensel with him, for appellee.

Mr. Justice Mitchell. The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, Alexander *v.* Jameson, 5 Bin. 238, and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely and even of wafers very largely ceased. In short sealing has become constructive rather than actual, and is in a great degree a matter of intention. It was said more than a century ago in McDill's Lessee *v.* McDill, 1 Dal. 63, that "the signing of a deed is now the material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good;" and in Long *v.* Ramsay, 1 S. & R. 72, it was said by Tilghman, C. J., that a seal with a flourish of the pen "is not now to be questioned." Any kind of flourish or mark will be sufficient if it be intended as a seal. "The usual mode," said Tilghman, C. J., in Taylor *v.* Glaser, 2 S. & R. 502, "is to make a circular oval, or square mark, opposite to the name of the signer; but the shape is immaterial." Accordingly it was held in Hacker's Appeal,

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intended another. The question is merely one of fact, and upon the evidence it is impossible to conclude that these instruments were ever executed as deeds so as to reconvey the estate." Lindley, L. J., in the same case said: "*In re* Sandilands was, I think, a good-natured decision, in which I am not sure that I could have concurred."

American decisions sustaining the common-law definition of a seal are: Woodbury *v.* U. S. Casualty Co., 284 Ill. 227; Manning *v.* Perkins, 86 Me. 419; Bates *v.* Boston &c. R. Co., 10 Allen, 251; Perrine *v.* Cheeseman, 6 Halst. 174.

121 Pa. 192, that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, the context and the circumstances showing that it was so intended. On the other hand in Taylor *v.* Glaser, *supra,* a flourish was held not a seal, because it was put under and apparently intended merely as a part of the signature. So in Duncan *v.* Duncan, 1 Watts, 322, a ribbon inserted through slits in the parchment, and thus carefully prepared for sealing, was held not a seal, because the circumstances indicated the intent to use a well-known mode of sealing, by attaching the ribbon to the parchment with wax or wafer, and the intent had not been carried out.

These decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended, and *a fortiori* the same result must be produced by writing the word "seal," or the letters "L. S.," meaning originally *locus sigilli,* but now having acquired the popular force of an arbitrary sign for a seal, just as the sign "&" is held and used to mean "and" by thousands who do not recognize it as the Middle Ages manuscript contraction for the Latin "et."

If therefore the word "seal" on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name to the left of the printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be cancelled before signing. The pressure of business life and the subdivision of labor in our day, have brought into use many things ready-made by wholesale which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments. But even in the early days of the century, the act of sealing was commonly done by adoption and ratification rather than as a personal act, as we are told by a very learned and experienced, though eccentric predecessor, in language that is worth quoting for its quaintness: *"Illi robur et aes triplex.* He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some effigies or inscription on stone or metal. . . . How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact the circumflex *is usually made by*

the scrivener drawing the instrument, and the word seal inscribed within it." Brackenridge, J., in Alexander *v.* Jameson, 5 Bin. 238, 244.

We are of opinion that the note in suit was duly sealed.

We have not derived much light from the decisions in other states, but so far as we have found any analogous cases they are in harmony with the views herein expressed. In Whitney *v.* Davis, 1 Swan (Tenn.), 333, the word "seal" without any scroll, was held to be a good seal even to a public deed by the clerk of a court, he stating in the certificate that no seal of office had been provided. And in Lewis *v.* Overby, 28 Gratt. (Va.) 627, the word "seal" without any scroll was held a good seal within a statute enacting that "any writing to which the person making it shall affix a scroll by way of seal shall be of the same force as if it were actually sealed."

The learned Court below, and the counsel for appellee placed much reliance on the decision in Bennett *v.* Allen, 10 Pa. C. C. R. 256. In that case the signature was placed to the left but below the printed letters "L. S.," and it is said in the opinion that there was a space of half an inch between. The decision might possibly be sustained on the ground that the position and distance showed that the signer did not intend to adopt the letters "L. S." as part of his act, but unless distinguished on that special ground the decision is contrary to the settled trend of our cases, and cannot be approved.

Order opening judgment is reversed and judgment reinstated.[1]

ANONYMOUS

Common Pleas, 1536

[*Reported in* 1 *Dyer,* 19 *a*]

An obligation was thus, "for the well and faithful payment of which I bind myself by these presents, dated, &c.," and not said "sealed with my seal," nor "in witness whereof:" wherefore it was asked of the Court, if such an obligation be good or not? And it seemed to Shelley and Fitzherbert, that the obligation is well enough, if a seal be put to the deed, etc.[2]

[1] Bertrand *v.* Byrd, 4 Ark. 195; Hastings *v.* Vaughan, 5 Cal. 315; Trasher *v.* Everhart, 3 G. & J. 234; Underwood *v.* Dollins, 47 Mo. 259; Groner *v.* Smith, 49 Mo. 318; English *v.* Helms, 4 Tex. 228; Green *v.* Lake, 2 Mackey, 162, *acc.*

In many other states statutes have enlarged the legal conception of what constitutes a seal, so as to include a scroll or other device.

[2] "For there are but three things of the essence and substance of a deed; that is to say writing in paper or parchment, sealing, and delivery, and if it hath these three, although it wanted, *in cujus rei testimonium sigillum suum apposuit,* yet the deed is sufficient, for the delivery is as necessary to the essence of a deed, as the putting of the seal to it, and yet it need not be contained in the deed that it was delivered." Goddard's Case, 2 Coke, 4 *b,* 5 *a.* Bedow's Case, 1 Leon. 25; Peters *v.* Field, Hetly, 75; Thompson *v.* Butcher, 3 Bulstr. 300, 302 (but see Clement *v.* Gunhouse, 5 Esp.

AUSTIN'S Administratrix *v.* WHITLOCK'S Executors

Supreme Court of Appeals of Virginia, 1810

[*Reported in* 1 *Munf.* 487]

To an action of covenant the defendants, without craving oyer, pleaded conditions performed, and issue was joined. At the trial the plaintiff produced a writing which concluded "As witness my hand this 22d day of February, 1791. D. Whitlock," with a written scroll annexed to the signature. The defendants moved the Court to exclude this evidence, but the Court overruled the motion and a verdict and judgment for the plaintiff followed. On appeal the judgment was reversed, whereupon the plaintiff appealed to this Court.

Peyton Randolph, for the defendant.

Wickham, contra.

Judge Tucker, after stating the case. That a covenant is a deed, and that a seal is one of the essential parts of a deed, is evident from the authorities generally, and especially Co. Litt. 6 a, 35 b, 175 b, 225 a and b, 229 b., and Litt. s. 371, 372. From several of which, and particularly the two last, it is apparent that the clause of *in cujus rei testimonium* ought to recite that the maker of the deed hath thereunto put his seal for, otherwise, a supposititious seal may be affixed to any instrument of writing, without proof of the acknowledgment thereof by the maker of the instrument, and a mere parol promise or agreement may be converted into a covenant, which is an instrument of a much higher nature; insomuch, that what might be considered as mere *nudum pactum,* as in the case of Hite, Ex'r of Smith *v.* Fielding Lewis's Ex'rs, in this Court, October 29, 1804 (MS.), may, by the subsequent addition of a seal or scroll, be converted into an obligation which should not only bind the maker and his executors, but his heirs also. For such would have been the effect of the writing signed by Fielding Lewis, in that case, "whereby he obliged himself, his heirs, executors, and administrators to indemnify Mrs. Smith," as executrix of Charles Smith, for the latter having become security for his son, if there had been a seal, or scroll, added to that instrument, and acknowledged by the maker, in the clause of attestation. But if such mention be unnecessary in the

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83); Burton *v.* LeRoy, 5 Sawy, 510; Jeffery *v.* Underwood, 1 Ark. 108; Bertrand *v.* Byrd, 4 Ark. 195; Cummins *v.* Woodruff, 5 Ark. 116; Conine *v.* Junction R. Co., 3 Hous. 288; Eames *v.* Preston, 20 Ill. 389; Hubbard *v.* Beckwith, 1 Bibb, 492; Wing *v.* Chase, 35 Me. 260; Trasher *v.* Everhart, 3 G. & J. 234, 246; Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 428. Sticknoth's Est., 7 Nev. 223, 234; Ingram *v.* Hall, 1 Hayw. 193, 209; Osborn *v.* Kistler, 35 Ohio St. 99; Taylor *v.* Glaser, 2 S. & R. 502; Frevall *v.* Fitch, 5 Whart. 325; Biery *v.* Haines, 5 Whart. 563; Hopkins *v.* Cumberland R. Co., 3 W. & S. 410; Lorah *v.* Nissley, 156 Pa. 329; Relph *v.* Gist, 4 McCord, 267; McKain *v.* Miller, 1 McMull, 313; Scruggs *v.* Brackin, 4 Yerg. 528, *acc.* See also McRaven *v.* McGuire, 17 Miss. 34; Hudson *v.* Poindexter, 42 Miss. 304.

body of the instrument, how easily may any instrument of the same kind be converted into one very different from it?[1]

EAMES *v.* PRESTON

ILLINOIS SUPREME COURT, 1858

[*Reported in* 20 *Illinois,* 389]

CATON, C. J. This was an action of assumpsit brought against Eames, Burlingame and Gray, upon a note thus executed, "Eames, Gray & Co. [ ]," and the only question is, whether assumpsit can be maintained on this note. If this be a sealed instrument, then assumpsit cannot be maintained upon it (1 Chit. Pl., title Assumpsit, p. 99), and this would seem to settle the question, for this is certainly an instrument under seal. If the member of the firm who executed the note had authority under seal to add the seals of all, then the seal attached is the seal of all; if he had not, then it is his seal only. In any event it is, as to him, a sealed instrument. If, as to the others, it is a simple instrument, that would not remove his seal. If one party executes an instrument and attaches his seal, and others afterwards sign it silently without attaching seals, they are presumed to adopt the seal of the first, and, as to all, it is a sealed instrument.[2] If, however, the first sign without

[1] The statement of the case has been abbreviated and a portion of the opinion, a well as concurring opinions of ROANE and FLEMING, JJ., omitted.

The doctrine of this case has been frequently followed in Virginia, and is applied where the seal attached to the instrument is an actual seal, as well as where it is a scroll. Bradley Salt Co. *v.* Norfolk Importing Co., 95 Va. 461 and cases cited. A similar rule prevails in a few other states. Lee *v.* Adkins, Minor, 187; Carter *v.* Penn. 4 Ala. 140; Moore *v.* Leseur, 18 Ala. 606; Blackwell *v.* Hamilton, 47 Ala. 470; McDonald *v.* Bear River Co., 13 Cal. 220; Bohannon *v.* Hough, 1 Miss. 461 (but see McRaven *v.* McGuire, 17 Miss. 34); Keller *v.* McHuffman, 15 W. Va. 64, 85. See also Buckingham *v.* Orr, 6 Col. 587.

In several other states a recital is necessary to give a scroll the effect of a seal, but a real seal is effectual without recital: Alt *v.* Stoker, 127 Mo. 466, and cases cited; Newbold *v.* Lamb, 2 South. (N. J.) 516; Corliss *v.* Van Note, 1 Harr. (N. J.) 324; Flemming *v.* Powell, 2 Tex. 225 (compare English *v.* Helms, 4 Tex. 228; Muckleroy *v.* Bethany, 23 Tex. 163). See also Brown *v.* Jordhal, 32 Minn. 135; Merritt *v.* Cornell, 1 E. D. Smith, 335.

[2] Biery *v.* Haines, 5 Whart. 563; Hess's Estate, 150 Pa. 346, *contra.* Where the instrument recited that the parties had sealed it, the presumption was held applicable in Davis *v.* Burton, 4 Ill. 41; McLean *v.* Wilson, 4 Ill. 50; Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206; Ryan *v.* Cooke, 152 Ill. 302; Tasker *v.* Bartlett, 5 Cush. 359; Lunsford *v.* La Motte Lead Co., 54 Mo. 426; Burnett *v.* McCluey, 78 Mo. 676, 688; Pequawkett Bridge *v.* Mathes, 7 N. H. 230; Tenney *v.* East Warren Lumber Co., 43 N. H. 343; Bowman *v.* Robb, 6 Pa. 302. See also Yarborough *v.* Monday, 3 Dev. 420; Hollis *v.* Pond, 7 Humph. 222; Lambden *v.* Sharp, 9 Humph. 224. But see Stabler *v.* Cowman, 7 G. & J. 284; State *v.* Humbird, 54 Md. 327, *contra.* In Cooch *v.* Goodman, 2 Q. B. 580, 598, Lord Denman, C. J., said: "It is true that one piece of wax may serve as a seal for several persons if each of them impresses it himself, or one for all, by proper authority, or in the presence of all, as was held in Ball *v.* Dunsterville, 4 T. R. 313, following Lord Lovelace's case, 5 B. & C. 355, but then it must appear by the deed, and profess to be the seal of each."

a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues as to him, a simple instrument, as it was when he first executed it.[1] Nor would this prevent it from being a sealed instrument as to those who deliberately attached their seals. As to one of the makers of this note, it was a sealed instrument, and assumpsit could not be maintained upon it.

The judgment must be reversed. *Judgment reversed.*

HANNAH F. SAUNDERS *v.* CHARLES F. SAUNDERS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 21, 1891–September 3, 1891

[*Reported in* 154 *Massachusetts,* 337]

MORTON, J. This action is brought by the plaintiff upon an instrument under seal to which she is not a party, and of which none of the consideration moved from her. The instrument is signed by Charles F. Saunders, the defendant, and is between him and George M. Saunders, who together, and the survivor of them, were entitled to the income of a trust fund. The consideration is one dollar paid by said George M. Saunders, and like covenants on the part of said George with said Charles to those contained in the instrument declared on. The covenants or agreements in the instrument relied on are as follows: "I, the said Charles F. Saunders, do hereby covenant and agree to and with the said George M. Saunders, and to and with such person as may be the wife of said George M. Saunders at the time of his decease, that if the said George M. shall die in my lifetime, leaving a widow living, I will, from and after the decease of said George M., and during my lifetime, pay over to such person as may be the widow of said George M., one third of the entire income aforesaid to which I may be entitled as such survivor." The plaintiff is the widow of George, and it is clear that, so far as she relies upon the covenant and agreements made between her husband and the defendant for her benefit, they will not support this action. It is well settled in this State, in regard to simple contracts, that "a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter." Exchange Bank *v.* Rice, 107 Mass. 37, and cases cited. Rogers *v.* Union Stone Co., 130 Mass. 581; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381; Marston *v.* Bigelow, 150 Mass. 45. In regard to con-

[1] Rankin *v.* Roler, 8 Gratt. 63, *acc.*

tracts under seal, the law has always been that only those who were parties to them could sue upon them. Saunders *v.* Filley, 12 Pick. 554; Johnson *v.* Foster, 12 Met. 167; Northampton *v.* Elwell, 4 Gray, 81; Flynn *v.* North American Ins Co., 115 Mass. 449; Flynn *v.* Massachusetts Benefit Association, 152 Mass. 288. The case of Felton *v.* Dickinson, 10 Mass. 287, to which this case would seem to be somewhat analagous, is fully explained in Marston *v.* Bigelow, *ubi supra,* and is authority only to the extent there indicated.

It is suggested, however, that, somewhat after the analogy furnished by letters of credit, the plaintiff may avail herself of so much of the covenants and agreements as purports to be made "to and with such person as may be the wife of said George M. Saunders at the time of his decease;" that is, that this covenant amounts to a promise on the part of the defendant to whomsoever may be the wife of George M. Saunders at his death, that he will pay her annually thereafter a certain sum so long as he shall live, and that the plaintiff, being the wife of said George, may therefore maintain an action upon it. But it is to be observed that the covenant did not purport to create a present agreement with the person who was the wife of George at the time the agreement between him and the defendant was executed; neither does it purport to be a continuing offer or promise on the part of the defendant, as in the case of a letter of credit or an offer of reward, that, if the person who shall be the wife of George at the time of his decease shall do certain things, then the defendant will pay her a certain sum. On the contrary, it was an attempt to create a covenant to arise wholly in the future between the defendant and a party who at the time was unascertained, and from whom no consideration was to move, and who was not in any way privy to the contract between the defendant and said George. We do not think this can be done.

The question whether the administrator or executor of the husband of the plaintiff may not maintain an action on the agreement for her benefit, or whether she may not herself bring suit in the name of the executor or administrator, has not been argued to us, and we have not therefore considered it. For these reasons, a majority of the Court think that, according to the agreement, the entry must be, *Judgment for the defendant.*

JAMES M. E. O'GRADY, As Executor, etc., of MARIA WHITELOCK, Deceased, Respondent, *v.* HOWE & ROGERS COMPANY and CHARLES M. THOMS, Appellants

New York Supreme Court, Appellate Division, March 3, 1915

[*Reported in* 166 *New York Appellate Division,* 552]

Robson, J. This was a suit by a vendor against a corporation and its agent to obtain specific performance of a contract to convey real estate. A written option was signed and sealed by the plaintiff and by Thoms, who was acting as agent for the Howe & Rogers Co. (whose name, however, did not appear in the contract) purporting to give an option to Thoms. Within the time limited in the option, Thoms delivered to the plaintiff an acceptance thereof in writing, signed by him.

The first objection raised by appellant Howe & Rogers Company is pointed to the initial proposition that the contract is under seal, and that, therefore, even though Thoms was in fact acting as the agent of Howe & Rogers Company, under the established law announced in many decisions no person, save the parties named in the contract and who actually signed it, can sue or be sued thereon. This statement of the law is unimpeachable, and was reasserted in the recent case entitled Case *v.* Case (203 N. Y. 263). But it seems to me that the contract which plaintiff seeks to enforce in this action is not under seal. True, the preliminary option agreement is under seal. But that agreement standing by itself gave neither party a right to enforce it as a contract to sell the land. No obligation to accept the option rested on Thoms. Something more must be done by him before any contract of sale came into being. That was an acceptance of the option by Thoms within the period of the option. This he did by the written acceptance above adverted to; but this acceptance was not under seal. It would seem to follow that the rule of law above stated cannot apply to prevent proof of the fact for whom Thoms was acting in accepting the option. It is the acceptance, and not the sealed option, that must be considered in determining whether Thom's agreement to purchase was a contract under seal.[1]

[1] The statement of facts is abbreviated and a portion of the opinion omitted.

SECTION II

DELIVERY

From BUTLER and BAKER'S CASE

King's Bench, 1591

[*Reported in* 3 *Coke,* 25 *a,* 26 *b*]

If A makes an obligation to B and delivers it to C to the use of B, this is the deed of A presently; but if C offers it to B, there B may refuse it *in pais,* and thereby the obligation will lose its force (but perhaps in such case A in an action brought on this obligation cannot plead *non est factum,* because it was once his deed).

ROBERTS *v.* SECURITY COMPANY, LIMITED

Court of Appeal, 1896

[*Reported in* [1897] 1 *Q. B.* 111]

Appeal by the defendants from the judgment of a Divisional Court (Grantham and Wright, JJ.) affirming the decision of the judge of the Leeds County Court.

The action was brought upon a policy of insurance against loss by burglary or housebreaking.

The plaintiff on December 14, 1895, signed and sent to the defendants a proposal for an insurance to the amount of 167*l.* upon furniture and other chattels in a dwelling-house against loss by burglary or housebreaking. The proposal, which was made upon a printed form, stated that the proposer agreed to acept a policy subject to the usual conditions prescribed by the company and indorsed on that policy. It was stated by the form that the policy was renewable on the 1st of the month, and the premium for the odd time over twelve months was to be added to the first year's premium; and that no insurance would be considered in force until the premium had been paid. The proposal stated that the annual premium was to be 9*s.* 9*d.*, and the first premium 9*s.* 11*d.*, 2*d.* being the addition in respect of the odd time.

On December 18 a document called a protection-note was signed by the defendants' agent in which it was stated that the plaintiff, having made a proposal to the company for insurance against loss arising from burglary or housebreaking for the sum of 167*l.* on property described in the proposal, and having paid to the agent the sum of £—— (the blank not being filled up), was thereby declared to be provisionally protected against that risk (subject to the

conditions contained in and indorsed on the form of policy used by the company) for seven days from the date thereof, or until the proposal should be in the meantime rejected. The protection-note contained a note that, in the event of the proposal being declined, the deposit paid would be refunded less the proportion of the premium for the period covered. The protection-note was sent by the defendants' agent to the plaintiff in a letter stating that a policy would be sent in due course. No sum of money ever was paid by way of premium. On the night of December 26, or early in the morning of December 27, a burglary was committed on the plaintiff's premises and a loss of some of the property alleged by the plaintiff to be insured was thereby occasioned. Upon December 27, at a meeting of directors of the defendants' company, who were then ignorant of the fact that the loss had taken place, the seal of the company was affixed to a policy of insurance in conformity with the proposal; and the policy was signed by two of the directors of the company and their secretary. The policy recited that the plaintiff had made a proposal dated December 14, 1895, to the company for an assurance of the property thereinafter described for the sum thereinafter appearing, and had paid to the company the sum called in the margin thereof the first premium, being the premium required by the company for the assurance of the said property from noon of December 14, 1895, to noon of January 1, 1897, and purported to insure the property described accordingly. In the margin were notes stating that 9*s.* 11*d.* was the sum paid for the first premium, that the renewal date was January 1, annually, and that the renewal premium was 9*s.* 9*d.* It was provided by the policy that no assurance by way of renewal or otherwise should be held to be affected until the premium due thereon should have been paid. The policy was not delivered to the plaintiff, but remained at the company's office. The plaintiff stated in evidence that he had never paid the premium, because he had never been asked for it. The defendants denied liability on the ground that, when the burglary took place, no contract for insurance had been concluded.

Channell, Q. C., and *G. M. Cohen,* for the defendants.

Longstaffe, for the plaintiff.

The county court judge gave judgment for the plaintiff.

Lord Esher, M. R. In my opinion this appeal fails. In this case there was a proposal for insurance which was accepted. It does not appear to me material to consider what would have been the effect of the proposal and the acceptance of it, if the matter had rested there. The transaction had gone beyond that stage; for a policy was executed under the seal of the company and the effect of that is what we have to consider. The question raised is whether an insurance was effected by the sealing and signing of the policy, or the execution of the policy was only intended to be conditional. I do not see any evidence of a conditional delivery, or that this docu-

ment was intended not to be a policy unless certain conditions were fulfilled. The document states that in witness thereof the company have caused their common seal to be affixed, and that the undersigned, being two directors and the secretary of the company, have thereunto set their hands. It is urged that the document was still in the hands of the company or of their officers on their behalf. There is no suggestion that it was delivered to any one as an escrow. If it was in the hands of the company itself, it could not be delivered as an escrow. The proper inference appears to me to be that the directors simply executed the policy, and the fact that it remained in their hands, or I should suppose in the hands of their secretary on their behalf, does not seem to me material. The company might have delivered the policy to some one to hold as an escrow, but they did not and never intended to do so. The policy was in my opinion executed by the company and was not executed conditionally. Therefore we must take it that there is an existing policy, and all we have to do is to construe it. It is a contract to insure the plaintiff against loss of the property insured by burglary or housebreaking from December 14, 1895, to January 1, 1897, and it recites that the assured has paid the premium for that insurance. It was said that that recital was incorrect, and that the premium so stated to have been paid never was in fact paid. I do not think the defendants are for the present purpose at liberty to show that in contradiction of the terms of their own deed. They have treated the premium as paid, and, if it has not been paid, I think they have thereby waived the previous payment as a condition of the existence of an insurance. With regard to the alleged custom in the case of marine insurance, which has been referred to, it is rather a practice than a custom properly so called. It is not confined to any particular place, but is a general practice for the convenience of trade. If, as I think, the company have by the terms of the policy which they have executed waived the previous payment of the premium as a condition of the insurance, what is the result? It appears to me that they may claim payment of the premium at any time, or, if there is a loss before it is paid, it may be deducted from the amount payable in respect of that loss, but they cannot, after they have executed a deed in these terms, get rid of liability merely on the ground that the premium has not been previously paid. For these reasons I think the appeal must be dismissed.[1]

[1] LOPES, L. J., and RIGBY, L. J., delivered concurring opinions. The decision follows Xenos *v.* Wickham, L. R. 2 H. L. 296. In that case the House of Lords, reversing the decision of the Exchequer Chamber, held a policy of insurance had become operative though still in the possession of the company. The judges were called upon for their opinions and Mellor and Blackburn, JJ., and Pigott, B., were of opinion that the policy had been delivered: Smith and Willes, JJ., were of a contrary opinion. The Lord Chancellor (Chelmsford) shared the opinion of the minority of the Judges and Lord Cranworth that of the majority. Doe *v.* Knight, 5 B. & C. 671; Hall *v.* Palmer, 3 Hare, 532; Fletcher *v.* Fletcher, 4 Hare, 67; Dillon *v.* Coffin, 4 M. & Cr. 647; Exton *v.* Scott, 6 Sim. 31; Jeffries *v.* Alexander, 8 H. L. C. 594; Bonfield *v.* Hassell, 32 Beav. 217, *acc.* *Conf.* Cracknall *v.* Janson, 11 Ch. D. 1.

MARY MEIGS *v.* MARY J. DEXTER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 18–November 23, 1898

[*Reported in* 172 *Massachusetts,* 217]

KNOWLTON, J.[1] On the question whether there was a delivery of the deed, the judge instructed the jury that if Hannah Hall, after signing the deed, placed it upon the table, or placed it in Captain Macomber's hands with the intention that it should become effective and operative, then there was a good delivery of the deed. The petitioner excepted to this instruction. The testimony tended to show that Captain Macomber was merely a scrivener before whom the deed was laid upon the table after it was signed, and that he went away and left it there, not representing the grantee in any way.

We are of opinion that the instruction was erroneous in omitting to embody the requirement that there should be an acceptance of the deed by some one representing the grantee. It is well settled in this Commonwealth that the delivery of a deed is not complete and effectual without an acceptance by the grantee, or by some one authorized to represent him, or who assumes to represent him, and whose act of acceptance is afterwards ratified. Hawkes *v.* Pike, 105 Mass. 560; Commonwealth *v.* Cutler, 153 Mass. 252; Barnes *v.* Barnes, 161 Mass. 381.[2]

SECTION III

CONSIDERATION

WALTHAM, ARGUENDO, IN ANONYMOUS, 1385.

[*Reported in Bellewe,* 111]

IN debt on contract the plaintiff shall show in his count for what cause the defendant became his debtor. Otherwise in debt on obligation, for the obligation is contract in itself.[3]

[1] A portion of the case is omitted.

[2] Almost all of the numerous cases on delivery of sealed instruments have arisen in regard to conveyances, and the subject is generally treated in connection with the law of conveyancing. See Gray's cases on Property, Vol. III. pp. 633–735; Devlin on Deeds, § 260 *et seq.*

[3] Also reported in Bellewe, 32; Fitz. Ab. Annuitie, pl. 54.

BROMLEY, Arguendo, in SHARINGTON *v.* STROTTON

King's Bench, 1565

[*Reported in* 1 *Plowden,* 298, 308 *a*]

And, Sir, by the law of this land there are two ways of making contracts or agreements for lands or chattles. The one is, by words, which is the inferior method; the other is, by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And if I promise to give you 20*l.* to make your sale *de novo,* here you shall not have an action against me for the 20*l.*, as it is affirmed in the said case in 17 Ed. 4, for it is a nude pact, *et ex nudo pacto non oritur actio.* And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good-will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Ed. 4, put it thus, that I by deed promise to give you 20*l.* to make your sale *de novo,* here you shall have an action of debt upon this deed, and the consideration is not examinable, for in the deed there is a sufficient consideration, *viz.* the will of the party that made the deed. And so where a carpenter, by parol without writing, undertook to build a new house, and for the not doing of it the party in 11 H. 4, brought an action of covenant against the carpenter, there it does not appear that he should have anything for building the house, and it was adjudged that the plaintiff should take nothing by his writ: but if it had been by specialty, it would have been otherwise; and so it is there held by Thirning, *causa qua supra.* So in 45 Ed. 3, in debt, the plaintiff counted that a covenant was made between him and the defendant, that the plaintiff should marry the defendant's daughter, and that the defendant should be bound to him in 100*l.*, and he said that he had married his daughter; and the count was challenged, because this debt is demanded upon a contract touching matrimony, which

ought to be in Court Christian; but notwithstanding this, forasmuch as he demanded a debt upon a deed, whereby it was become a lay-contract, he was put to answer: but otherwise it would have been if it had been without deed, as it is there put; and 14 Ed. 4, and also 17 Ed. 4, are, that if it be without deed the action does not lie, because the marriage, which is the consideration, is a thing spiritual: which books are contrary to the opinion of Thorp in the said case in 22 Ass. fol. 305. So that where it is by deed, the cause or consideration is not enquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound, for every deed imports in itself a consideration, *viz.*, the will of him that made it, and therefore where the agreement is by deed, it shall never be called a *nudum pactum*. And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be enquired, for it is sufficient to say that it was his will to make the deed.[1]

PAUL K. L. E. KRELL AND ANOTHER *v.* ROBERT CODMAN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, November 12, 13, 1890–October 24, 1891

[*Reported in* 154 *Massachusetts,* 454]

HOLMES, J. This is an action on a voluntary covenant in an indenture under seal, executed by the defendant's testatrix in England, that her executors, within six months after her death, should pay to the plaintiffs, upon certain trusts, the sum of 2,500*l.*, with interest at four per cent from the day of her death.

It is agreed that by the law of England such a covenant constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies. But it is contended by the defendant that a similar instrument executed here would be void. The testatrix died domiciled in Massachusetts, and the only question is whether the covenant can be enforced here. If a similar covenant made here would be enforced in our courts, the plaintiffs are entitled to recover, and in the view which we take on that question it is needless to examine with nicety how far the case can be governed by the English law as to domestic covenants, and how far by that of Massachusetts.

In our opinion, such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this

[1] "I would have one case showed by men learned in the law, where there is a deed, and yet there needs a consideration; as for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it." Bacon on Uses, 13 (about 1602).

State. If it were a contract upon valuable consideration, there is no doubt it would be binding. Parker v. Coburn, 10 Allen, 82. We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consideration. Parish v. Stone, 14 Pick. 198, 207. This being so, consideration is as much a form as a seal. It would be anomalous to say that a covenant in all other respects unquestionably valid and binding (Comstock v. Son, 154 Mass. 389, and Mather v. Corliss, 103 Mass. 568, 571) was void as contravening the policy of our statute of wills, but that a parol contract to do the same thing in consideration of a bushel of wheat was good. So, again, until lately an oral contract founded on a sufficient consideration to make a certain provision by will for a particular person was valid. Wellington v. Apthorp, 145 Mass. 69. Now, by statute, no agreement of that sort shall be binding unless agreement is in writing, signed by the party whose executor is sought to be charged, or by an authorized agent. St. 1888, c. 372. Again, it would be going a good way to say by construction that a covenant did not satisfy this statute.

The truth is, that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition of his property. But a contract which is put into the hands of the adverse party, and from which the contractor cannot withdraw, stands differently. See Perry v. Cross, 132 Mass. 454, 456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses, a distinction based on the presence or absence of a valuable consideration becomes impossible with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers and executed in the most solemn form known to the law, is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promisee. Of course, we are not now speaking of the rank of such contracts *inter sese*. Stone v. Gerrish, 1 Allen, 175, cited by the defendant, contains some ambiguous expressions, but was decided on the ground that the instrument did not purport to be and was not a contract. Cover v. Stem, 67 Md. 449, was to like effect. The present instrument indisputably is a contract. It was drawn in English form by English lawyers, and must be construed by English law. So construed, it created a debt on a contingency from the covenantor herself, which if she had gone into bankruptcy would have been provable against her. *Ex parte* Tindal, 8 Bing. 402; s. c. 1 D. & Ch. 291, and Mont. 375, 462; Robson, Bankruptcy (5th ed.), 274. The cases of Parish v. Stone, 14 Pick. 198, and Warren v. Durfee, 126 Mass. 338, were

actions on promissory notes, and were decided on the ground of a total or partial want of consideration.

There is no question here of any attempt to evade or defeat rights of third persons, which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills, — if such intent could be material when an otherwise binding contract was made. See Stone *v.* Hackett, 12 Gray, 227, 232, 233. There was simply an intent to make a more binding and irrevocable provision than a legacy could be, and we see no reason why it should not succeed.

Judgment for the plaintiffs.[1]

[1] In many States the distinction between sealed and unsealed written contracts is abolished.

In most of these States it is also enacted that any written contract shall be presumed to have been made for sufficient consideration; but if lack of consideration is affirmatively proved the contract is invalid.

In other States it is enacted only that sealed contracts shall be presumed in the absence of contrary evidence to have been made for sufficient consideration, and in such States sealed contracts differ from ordinary written contracts to this extent.

CHAPTER III

PARTIES AFFECTED BY CONTRACTS

SECTION I

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

BOURNE *v.* MASON and Another

In the King's Bench, Hilary Term, 1669

[*Reported in* 1 *Ventris,* 6]

In an assumpsit, the plaintiff declares, that, whereas one Parrie was indebted to the plaintiff and defendants in two several sums of money, and that a stranger was indebted in another sum to Parrie; that there being a communication between them, the defendants, in consideration that Parrie would permit them to sue, in his name, the stranger, for the sum due to him, promised that they would pay the sum which Parrie owed to the plaintiff; and alleged that Parrie permitted them to sue, and that they recovered. After non-assumpsit pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment that the plaintiff could not bring his action, for he was a stranger to the consideration.

But in maintenance thereof, a judgment was cited in 1658, between Sprat and Agar, in the King's Bench, where one promised to the father, in consideration that he would give his daughter in marriage with his son, he would settle so much land. After the marriage the son brought the action; and it was adjudged maintainable. And another case was cited of a promise to a physician, that if he did such a cure he would give such a sum of money to himself and another to his daughter; and it was resolved the daughter might bring an assumpsit. Which cases the court agreed: for in the one case the parties that brought the assumpsit did the meritorious act, though the promise was made to another; and in the other case, the nearness of the relation gives the daughter the benefit of the consideration performed by her father; but here the plaintiff did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration; wherefore it was adjudged *quod nil capiat per billam.*

DUNLOP PNEUMATIC TYRE COMPANY, Ltd. Appellants, *v.* SELFRIDGE & COMPANY, Ltd. Respondents

In the House of Lords, April 26, 1915

[*Reported in* [1915] *Appeal Cases,* 847]

The appellant, a manufacturer of motor tyres and accessories, contracted with Messrs, A. J. Dew & Co., dealers in such goods, to allow the latter on goods sold to them discounts from list prices, but on condition that on making any resale they should require the sub-purchaser to contract to maintain list prices. A form was provided for such sub-purchasers to sign, by which the sub-purchaser in terms agreed to pay to the appellant the sum of £5 as liquidated damages for every tyre cover or tube sold in breach of his agreement.

Messrs. Dew & Co. sold to the respondent certain goods of the appellant's manufacture, and the respondent signed the agreement prescribed for sub-purchasers. Subsequently the respondent violated the agreement it had made with Dew & Company, and the appellant began this action, and was given judgment by Phillimore, J. The Court of Appeal reversed his decision, and this appeal was thereupon taken.

Lord Dunedin. My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was right.

My Lords, I am content to adopt from a work of Sir Frederick Pollock, to which I have often been under obligation, the following words as to consideration: "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." (Pollock on Contracts, 8th ed., p. 175.)

Now the agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce it he must show consideration, as above defined, moving from Dunlop to Selfridge.

In the circumstances, how can he do so? The agreement in question is not an agreement for sale. It is only collateral to an agreement for sale, but that agreement for sale is an agreement entirely

between Dew and Selfridge. The tyres, the property in which upon the bargain is transferred to Selfridge, were the property of Dew, not of Dunlop, for Dew under his agreement with Dunlop held these tyres as proprietor, and not as agent. What then did Dunlop do, or forbear to do, in a question with Selfridge? The answer must be, nothing. He did not do anything, for Dew, having the right of property in the tyres, could give a good title to any one he liked, subject, it might be, to an action of damages at the instance of Dunlop for breach of contract; which action, however, could never create a *vitium reale* in the property of the tyres. He did not forbear in anything, for he had no action against Dew which he gave up, because Dew had fulfilled his contract with Dunlop in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed.

To my mind, this ends the case. That there are methods of framing a contract which will cause persons in the position of Selfridge to become bound, I do not doubt. But that has not been done in this instance and as Dunlop's advisers must have known of the law of consideration, it is their affair that they have not so drawn the contract.

I think the appeal should be dismissed.[1]

DUTTON AND WIFE *v.* POOLE

IN THE KING'S BENCH, MICHAELMAS TERM, 1677

[*Reported in* 2 *Levinz,* 210]

ASSUMPSIT, and declares that, the father of the plaintiff's wife being seised of a wood, which he intended to fell to raise portions for younger children, the defendant, being his heir, in consideration the father would forbear to fell it at his request, promised the father to pay his daughter, now the plaintiff's wife, 1000*l.* and avers that the father at his request forbore; but the defendant had not paid the 1000*l.* After verdict for the plaintiff upon non-assumpsit, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or, if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her: also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise. . . .

[1] Viscount Haldane, L. C., Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor, delivered concurring opinions.

On the other side it was said, if a man deliver goods or money to A. to deliver or pay to B., B. may have an action, because he is to have the benefit of the bailment; so here the daughter is to have the benefit of the promise: so if a man should say, Give me a horse, I will give your son 10*l.*, the son may bring the action, because the gift was upon consideration of a profit to the son, and the father is obliged by natural affection to provide for his children; for which cause, affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration and in the promise; and the son had a benefit by this agreement, for by this means he hath the wood, and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father. . . . Upon the first argument, Wilde and Jones, Justices, seemed to think that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise nor consideration. Twysden and Rainsford seemed *contra;* and afterwards, two new judges being made, *scil.*, Scroggs, Chief Justice, in lieu of Rainsford, and Dolben, in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs, Chief Justice, said, that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children. . . . Dolben, Justice, concurred with him that the daughter might bring the action; Jones and Wylde *hæsitabant.* But next day they also agreed to the opinion of the Chief Justice and Dolben; and so judgment was given for the plaintiff, for the son hath the benefit by having of the wood, and the daughter hath lost her portion by this means. . . . And *nota,* upon this judgment error was immediately brought; and Trin., 31 Car. 2, it was affirmed in the Exchequer Chamber.

TWEDDLE *v.* ATKINSON, Executor of GUY, Deceased

In the Queen's Bench, June 7, 1861

[*Reported in* 1 *Best & Smith,* 393]

The declaration stated that the plaintiff was the son of John Tweddle, deceased and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the marriage the parents of the parties to the marriage orally promised to give the plaintiff a marriage portion; and after the marriage in order to give effect to their promises the parents entered into the following written agreement for the plaintiff's benefit:

HIGH CONISCLIFFE, July 11, 1855.

Memorandum of an agreement made this day between William Guy, of, &c., of the one part, and John Tweddle, of, &c., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of 200*l.* to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of 100*l.* to the said William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sum, hereby promised and specified.

The declaration further alleged that afterwards and before this suit, the plaintiff and his said wife, who is still living, ratified and assented to the said agreement, yet neither the said William Guy nor his executor has paid the promised sum of 200*l.*

Demurrer and joinder therein.

Edward James, for the defendant.

Mellish, for the plaintiff.

CROMPTON, J. It is admitted that the plaintiff cannot suceed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promise cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shows a contract which might be sued on, except for the enactment in sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mr. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And Dutton and Wife *v.* Poole was

cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which that one cannot be supported. The cases upon stat. 27 El. c. 4, which have decided that, by sect. 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by sect. 4, show that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

Judgment for the defendant.[1]

NATIONAL BANK *v.* GRAND LODGE

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1878

[*Reported in* 98 *United States,* 123]

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action by the Second National Bank of St. Louis, Missouri, against the Grand Lodge of Missouri of Free and Accepted Ancient Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, Oct. 14, 1869, adopted the following resolution: —

"*Resolved,* That this Grand Lodge assume the payment of the two hundred thousand dollars bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid."

The court below instructed the jury, that, independently of the question of the power of the Grand Lodge to pass the resolution, it was no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the court; and judgment having been entered thereon, the plaintiff sued out this writ of error.

Mr. *John C. Orrick,* for the plaintiff in error.

Mr. *John D. S. Dryden, contra.*

Mr. JUSTICE STRONG delivered the opinion of the court: —

It is necessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes.* It was a contract made for the benefit of the

[1] The statement of facts is abbreviated and the concurring opinion of Wightman, J., omitted.

association and of the Grand Lodge, — made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge, the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the lodge was to assume the payment of the two hundred thousand dollars bonds, issued by the association, "*Provided,* that stock is issued to the Grand Lodge by said association to the amount of said assumption," . . . "as said bonds are paid." Certainly the obligation of the lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt

to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the lodge would ever have agreed. *Judgment affirmed.*[1]

CLARA H. BORDEN *v.* JOHN W. BOARDMAN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 24–November 25, 1892

[*Reported in* 157 *Massachusetts,* 410]

CONTRACT. Trial in the Superior Court, before Braley, J., who reported the case for the determination of this court, in substance as follows:

On July 24, 1890, Daniel J. Collins, a contractor, made a contract in writing with the defendant to build him a house in New Bedford, for the sum of twenty-six hundred and fifty dollars, payable one half when the house was ready for plastering, the balance when finished. The defendant advanced to Collins two hundred dollars before the first payment was due, taking his receipt therefor. During the progress of the work, and before the first payment became due according to the terms of the contract, the building was blown off the foundation. Collins employed the plaintiffs, who were building movers, to put the building back, under an agreement that it should not cost more than one hundred and fifty dollars; the plaintiffs put the building back, finishing the moving a month or six weeks prior to the first payment. Collins then proceeded with the work, and got the building ready to plaster. When the time for the first payment arrived the defendant told Collins he would like to have all persons who had lienable bills against the house present to see that they were paid. The plaintiffs were not present, so the defendant asked Collins how much was due them, and was told one hundred and fifty dollars. The defendant thereupon, at the request and with the consent of Collins, reserved two hundred dollars for the plaintiffs, saying he would hold this money to pay them with, and would pay them himself. Collins thereupon gave the defendant a receipt for eleven hundred and twenty-five dollars, as first payment on the house. Neither Collins nor the defendant informed the plaintiffs of the holding of this money; but in consequence of what a third person told Manchester, one of the plaintiffs, Manchester called upon the defendant, and said to him, "I understand that you are holding my money for me for moving that building back. Is

[1] The opinion is slightly abbreviated.

that so?" Boardman replied that it was. Manchester then said, "I am glad that you have got it and will pay it." Boardman said, "I don't know as I will now; I have been advised not to." No other interview was had between the plaintiffs and the defendant.

The defendant claimed that, upon this evidence, the action could not be maintained, and offered to show, in bar of the action, that, a day or so after the time of the first payment, Collins abandoned and broke his said contract, and the defendant was obliged to finish the building at a loss, and that at the time of refusing to pay Manchester, he, Manchester, was told by the defendant that Collins had broken his contract; and that on December 9, 1890, after refusal to pay them by the defendant, the plaintiffs commenced an action against said Collins for the recovery of the claim now in suit. The evidence was excluded. The judge directed a verdict for the plaintiffs for one hundred and fifty dollars, and interest from the date of the writ. If the ruling was right, then judgment was to be entered on the verdict; otherwise, judgment for the defendant.

F. A. Milliken, for the defendant.

E. L. Barney, for the plaintiffs.

Morton, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiffs, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiffs only in case Collins fulfilled his contract. Cook *v.* Wolfendale, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation; for there was no agreement among the plaintiffs, Collins, and the defendant that the defendant should pay to the plaintiffs, out of the money in his hands and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be liable for it to the plaintiffs. Neither was there any agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. Coupled with the defendant's admission that he was holding money for the plaintiffs was his repudiation of any liability to the painstaking opinion by the late Chief Justice Savage, in which table assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them; nor was any notice of the arrangement between him and the defendant given by him to the plaintiffs. Lazarus *v.* Swan, 147 Mass. 330. The case upon this branch, therefore, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration it may be between them, that one will pay, out of funds in his hands belonging to the other, a specific sum to a third person, who is not

a party to the agreement, and from whom no consideration moves. It is well settled in this State that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. Exchange Bank *v.* Rice, 107 Mass. 37, and cases cited; Rogers *v.* Union Stone Co., 130 Mass. 581; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381; Marston *v.* Bigelow, 150 Mass. 45; Saunders *v.* Saunders, 154 Mass. 337. Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. Exchange Bank *v.* Rice, and Marston *v.* Bigelow, *ubi supra.*

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than one hundred and fifty dollars to put the building back. Collins told the defendant that that sum was due to the plaintiffs. The defendant reserved two hundred dollars. It may well be doubted, therefore, whether the defendant had in his hands a specific sum to be paid to the plaintiffs, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific, the plaintiffs do not claim, as we understand them, that they can recover. *Judgment for the defendant.*

LAWRENCE *v.* FOX

New York Court of Appeals December, 1859

[*Reported in* 20 *New York,* 268]

Appeal from the Superior Court of the City of Buffalo. On the trial before Mr. Justice Masten it appeared by the evidence of a bystander that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon three several grounds, viz.: that there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration; and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, $344.66, upon which judgment was entered; from which the defendant appealed to the Superior Court, at General Term, where the

judgment was affirmed, and the defendant appealed to this court. The cause was submitted on printed arguments.

I. S. Torrance, for the appellant.

E. P. Chapin, for the plaintiff.

H. GRAY, J. The first objection raised on the trial amounts to this: That the evidence of the person present who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant was mere hearsay, and therefore not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterwards sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground, and warranted the verdict of the jury. But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this State — in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed — that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the Court for the Correction of Errors (Farley *v.* Cleaveland, 4 Cow. 432; same case in error, 9 id. 639). In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise, although made for the benefit of the plaintiff, could not enure to his benefit. The hay which Moon delivered to Cleaveland was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this

State, and has never been doubted as sound authority for the principle upheld by it. Barker *v.* Bucklin, 2 Denio, 45; Hudson Canal Company *v.* The Westchester Bank, 4 id. 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon, but to the plaintiff Farley. In this case the promise was made to Holly, and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." Schermerhorn *v.* Vanderheyden, 1 John. R. 140, has often been reasserted by our courts and never departed from. The case of Seaman *v.* White has occasionally been referred to (but not by the courts) not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in Schermerhorn *v.* Vanderheyden. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phœnix Bank. Before the note matured, and while it was owned by the Phœnix Bank, Hill placed in the hands of the defendant Whitney his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay; and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phœnix Bank, who then owned the note; although, in the course of the opinion of the court, it was stated that, in all cases the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by

the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of Schermerhorn *v.* Vanderheyden, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. The Delaware and Hudson Canal Company *v.* The Westchester County Bank, 4 Denio, 97. The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them, — Arnold *v.* Lyman, 17 Mass. 400; Hall *v.* Marston, id. 575; Brewer *v.* Dyer, 7 Cush. 337, 340. In Hall *v.* Marston the court say: "It seems to have been well settled that, if A. promises B. for a favorable consideration to pay C., the latter may maintain assumpsit for the money;" and in Brewer *v.* Dyer the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." There is a more recent case decided by the same court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of Mellen *v.* Whipple, 1 Gray, 317. In that case one Rollins made his note for $500, payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant by deed, in which it was stated that the "granted premises were subject to a mortgage for $500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterwards duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security; and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no considera-

tion to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. This is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering. But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of Felton *v.* Dickinson, 10 Mass. 287, 290, and others that might be cited, are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust,* according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases. It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit, and in accordance with legal presumption accepted by him (Berly *v.* Taylor, 5 Hill, 577–584, *et seq.*), until his dissent was shown? The cases cited, and especially that of Farley *v.* Cleaveland, establish the validity of a parol promise; it stands then upon the footing of a written one.

Suppose the defendant had given his note, in which, for value received of Holly, he had promised to pay the plaintiff, and the plaintiff had acepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this State, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, C. J., DENIO, SELDEN, ALLEN, and STRONG, JJ., concurred. JOHNSON, C. J., and DENIO, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J., gave a dissenting opinion. GROVER, J., also dissented. *Judgment affirmed.*

SILAS D. GIFFORD, AS RECEIVER, ETC., RESPONDENT, *v.* MICHAEL AUGUSTINE CORRIGAN, ETC., APPELLANT

NEW YORK COURT OF APPEALS, October 16–November 26, 1889

[*Reported in* 117 *New York,* 257]

APPEAL by defendant Corrigan, as executor of Cardinal McCloskey, from a judgment for plaintiff affirming ajudgment by the trial Court.

This action was brought to foreclose a mortgage executed by defendant, The Father Matthew Temperance Society. Defendant Corrigan, as executor, was sought to be charged for any deficiency on sale upon a covenant in a deed of the mortgaged premises executed to his testator by John McEvoy, by the terms of which the grantee assumed and agreed to pay the mortgage.

The facts, so far as material to the questions discussed, are stated in the opinion.

Edward C. Boardman, for appellant.

Ralph E. Prime, for respondents.

FINCH, J. On a previous appeal we determined in this case that the record of the deed to the defendant's testator, McCloskey, by which the grantee assumed the payment of plaintiff's mortgage, was not, under the circumstances, sufficient proof of the delivery and acceptance of the deed. As the case now stands the effect of that

record is fortified by direct proof of the delivery and strong circumstantial evidence of the acceptance. Both facts are now explicitly found by the trial court, but the appellant again denies the sufficiency of the proof.

The mortgage was executed in 1869. The land which it covered was sold and conveyed to McEvoy in 1870. McEvoy was a parish priest, and held the title until 1878, when he conveyed to McCloskey, the defendant's testator, who in and by the deed assumed the payment of the outstanding mortgage. Two things occurred the next year: McCloskey was informed by letter that upon the premises owned by him, describing those conveyed by McEvoy, there was a mortgage to Masterton, payment of which was requested, and a few days after, in a personal interview with the attorney acting for the mortgagee, was told of the deed and its record, and the assumption clause was read to him and his liability under it asserted. McCloskey answered that he would communicate with Father Keogh; that he had referred the matter to him, and that the witness would hear from Keogh. The latter was the successor of McEvoy as parish priest, and owed his appointment to the cardinal. The second thing was that the account for the rents of the property collected by Keogh were by him returned once a year to the chancery office which managed the cardinal's business affairs relating to the church. Within one year, therefore, after the record of the deed McCloskey knew all about it, and instead of repudiating it and refusing acceptance, simply referred the creditor to the parish priest who began a uniform system of collecting the rents of the property and returning the facts to the cardinal's business office, which was their proper repository. Keogh not only remained in possession under McCloskey, but insured the premises in the name of the cardinal. For some time after its record the deed remained in the custody of McEvoy, but as early as 1882 he delivered it to O'Connor, who was a clerk in the chancery office. The superintendent of that office was Preston. He is called in the record vicar-general and chancellor and monseigneur. Whatever his ecclesiastical title, his own evidence shows that he was merely a subordinate or secretary of the cardinal, with no authority of his own, and depended wholly upon the directions of his superior, either general or specific. His attention was called to the deed after its delivery at the chancery office by O'Connor, who delivered it. Preston says that the next time he saw Keogh he "positively forbade him to have anything to do with that hall or to accept any rent for it." This is said to have occurred in 1882. It does not appear that Preston had any authority from the cardinal to issue this order to Keogh, or any general direction which covered it. It is certain that Keogh did not obey it, for he continued to collect the rents and report them as part of his parish accounts to the chancery office. Preson was either ignorant of the current transactions which it was his duty to supervise, or he had withdrawn his

command, or the parish priest was deliberately defying his superiors and they were patiently submitting to it. At all events, the deed rested in the chancery office, the priest kept possession of the property, and accounted for its rents to McCloskey; no offer of a reconveyance has been made, and the record is searched in vain for any word or act of refusal or repudiation by McCloskey. On such a state of facts the finding of the Special Term that there was a delivery and acceptance may easily stand, and must conclude us on this appeal.

But another circumstance introduces an additional defence and raises a further question. Just after the issue of a summons in this action and the filing of a *lis pendens,* the executor of McEvoy formally released McCloskey from his covenant, and the latter pleads that release. It asserts that the deed was never delivered, which is found to be an untruth; that the assumption clause was inserted by mistake and inadvertence, of which there is not a particle of proof; and then in further consideration of $1 formally releases the cardinal from his covenant. This release was executed after the knowledge of the deed of McCloskey and the covenant contained in it had reached the mortgagee; after the latter had accepted and adopted it as made for his benefit and communicated that fact to the debtor by a formal demand of payment; after the mortgagee had, for three years, permitted the grantee to absorb and appropriate the rents and profits in reliance upon the covenant; and after he had commenced an action for foreclosure by the issue of a summons and filing of a *lis pendens,* at a moment when the executor who released was aware that trouble was approaching, but before McCloskey was actually served or had appeared in the action.

Is this release thus executed a defence to this action? I shall not undertake to decide, if, indeed, the question is open (Knickerbocker Life Ins. Co. *v.* Nelson, 78 N. Y. 137; Comley *v.* Dazian, 114 id. 161, 167), whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee it was or was not revocable without his assent. However that may be, the only inquiry now presented is, whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative.

Of course it is difficult, if not impossible, to reason about it without recurring to Lawrence *v.* Fox (20 N. Y. 268), and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted

upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract nor its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge and he has assented to and acted upon it. For he *may* sue; that is decided and conceded. If he may sue, he must, at that moment, have a vested right of action. If it was not obtained earlier it must have vested in him at the moment when his action was commenced, so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff, that the latter has accepted and adopted it, that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act in reliance upon it. But if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion.

But two of the judges who concurred in the decision of Lawrence *v.* Fox stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant as agent of the mortgagee, who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal ficton, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee, through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

But another basis for the action has been asserted, applicable, however, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor. In Burr *v.* Beers, 24 N. Y. 179, and again in Garnsey *v.* Rogers, 47 N. Y. 242, it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before

Lawrence *v.* Fox made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might, in equity, be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in Halsey *v.* Reed, 9 Paige, 446, and the right of the mortgagee was put upon the equity of the statute. That, if a sound proposition, was all very well so long as there was supposed to be no equivalent remedy at law, but after the decision of Lawrence *v.* Fox that remedy existed. And so in Thorp *v.* Keokuk Coal Company, 48 N. Y. 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed, in a broader equity, the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so I think the suggestion is well founded. But if I am wrong about that, as, perhaps, I may prove to be, and the right of the present plaintiff against the cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise and become vested in the creditor? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it and notifies the other party of his intention to rely upon it. As a right, founded upon the equity of the statute, it must have came into being before the foreclosure suit was commenced; for the permission reads, "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action." His liability must precede the commencement of the action. It must exist as a condition of his being sued at all; and so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or, at the latest, when the promise came to the knowledge of the creditor, and he assented to and adopted it.

I have been quite favorably impressed with a fourth suggestion respecting the basis of these rights of action which appears in the opinion of Andrews, J., rendered when this case was before us on a previous appeal. "After all," he says, "does not the direct right of action rest upon the equity of the transaction?" If we discard the fictitious theory of an agency, what remains is the equitable right of subrogation swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor. It is no new thing for the law to borrow weapons from the arsenal of equity. The action for money had and received

is a familiar illustration. May we not deem this another? If we do, and the door is thus opened wide to equitable considerations, I am quite sure it will follow that while no right of the mortgagee is invaded by a change of the contract before it is brought to his knowledge, and he has assented to it and acted upon it, yet to permit a change thereafter, while the creditor is relying upon it, would be grossly inequitable and practically destroy the right which has maintained itself after so long a struggle.

It seems to me, therefore, that however we may reasonably differ as to the doctrine underlying the plaintiff's right of action, yet all the roads lead to the one result that upon the facts of this case the release to McCloskey was wholly ineffectual.

The judgment should be affirmed, with costs.

All concur except DANFORTH and PECKHAM, JJ., dissenting.

Judgment affirmed.[1]

MARION E. SEAVER, RESPONDENT, *v.* MATT C. RANSOM, ET AL., AS EXECUTORS

NEW YORK COURT OF APPEALS, June 12, 1918–October 1, 1918

[*Reported in* 224 *New York,* 233]

POUND, J. Judge Beman and his wife were advanced in years. Mrs Beman was about to die. She had a small estate consisting of a house and lot in Malone and little else. Judge Beman drew his wife's will according to her instructions. It gave $1,000 to plaintiff, $500 to one sister, plaintiff's mother, and $100 each to another sister and her son, the use of the house to her husband for life, remainder to the American Society for the Prevention of Cruelty to Animals. She named her husband as residuary legatee and executor. Plaintiff was her niece, thirty-four years old, in ill health, sometimes a member of the Beman household. When the will was read to Mrs. Beman she said that it was not as she wanted it; she wanted to leave the house to plaintiff. She had no other objection to the will, but her strength was waning and although the judge offered to write another will for her, she said she was afraid she would not hold out long enough to enable her to sign it. So the judge said if she would sign the will he would leave plaintiff enough in his will to make up the difference. He avouched the promise by his

[1] In Forbes *v.* Thorpe, 209 Mass. 570, 582, in speaking of a contract by which a firm on conveying its property to a corporation obtained a contract from the latter by which the corporation assumed and agreed to pay the firm debts, the court said: "The contract being made by the firm for the benefit of their creditors, the latter may enforce in equity the rights of the copartners to compel the corporation to perform its agreement in this regard. This is a property right not subject to attachment which can be reached in equity and made available for the benefit of the creditor." See also Keller *v.* Ashford, 133 U. S. 610; McIlvane *v.* Big Stony Lumber Co., 105 Va. 613.

uplifted hand with all solemnity and his wife then executed the will. When he came to die it was found that his will made no provision for the plaintiff.

This action was brought and plaintiff recovered judgment in the trial court on the theory that Beman had obtained property from his wife and induced her to execute the will in the form prepared by him by his promise to give plaintiff $6,000, the value of the house, and that thereby equity impressed his property with a trust in favor of plaintiff. Where a legatee promises the testator that he will use property given him by the will for a particular purpose, a trust arises. (O'Hara *v.* Dudley, 95 N. Y. 403; Trustees of Amherst College *v.* Ritch, 151 N. Y. 282; Ahrens *v.* Jones, 169 N. Y. 555.) Beman received nothing under his wife's will but the use of the house in Malone for life. Equity compels the application of property thus obtained to the purpose of the testator, but equity cannot so impress a trust except on property obtained by the promise. Beman was bound by his promise, but no property was bound by it; no trust in plaintiff's favor can be spelled out.

An action on the contract for damages or to make the executors trustees for performance stands on different ground. (Farmers Loan & Trust Co. *v.* Mortimer, 219 N. Y. 290, 294, 295.) The Appellate Division properly passed to the consideration of the question whether the judgment could stand upon the promise made to the wife, upon a valid consideration, for the sole benefit of plaintiff. The judgment of the trial court was affirmed by a return to the general doctrine laid down in the great case of Lawrence *v.* Fox (20 N. Y. 268) which has since been limited as herein indicated.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. (Williston, Contracts for the Benefit of a Third Person, 15 Harvard Law Review, 767; Corbin, Contracts for the Benefit of Third Persons, 27 Yale Law Review, 1008.) The general rule, both in law and equity (Phalen *v.* U. S. Trust Co., 186 N. Y. 178, 186), was that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party to whom the promise was made. The contract cannot be enforced against the third party and, therefore, it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and is said to be "the prevailing rule in this country." (Hendrick *v.* Lindsay, 93 U. S. 143; Lehow *v.* Simonton, 3 Col. 346.) It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." (Brantly on Contracts [2d ed.], p. 253.) The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made

to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule (7 Halsbury's Laws of England, 342, 343; Jenks' Digest of English Civil Law, § 229) that a contract cannot be enforced by or against a person who is not a party. (Exchange Bank *v.* Rice, 107 Mass. 37; but see, also, Forbes *v.* Thorpe, 209 Mass. 570; Gardner *v.* Denison, 217 Mass. 492.) In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined, *first,* to cases where there is a pecuniary obligation running from the promisee to the beneficiary; "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." (Farley *v.* Cleveland, 4 Cow. 432; Lawrence *v.* Fox, *supra;* Garnsey *v.* Rogers, 47 N. Y. 233; Vrooman *v.* Turner, 69 N. Y. 280; Lorillard *v.* Clyde, 122 N. Y. 498; Durnherr *v.* Rau, 135 N. Y. 219; Townsend *v.* Rackham, 143 N. Y. 516; Sullivan *c.* Sullivan, 161 N. Y. 554.) *Secondly,* to cases where the contract is made for the benefit of the wife (Buchanan *v.* Tilden, 158 N. Y. 109; Bouton *v.* Welch, 170 N. Y. 5540), affianced wife (De Cicco *v.* Schweizer, 221 N. Y. 431), or child (Todd *v.* Weber, 95 N. Y. 181, 193; Matter of Kidd, 188 N. Y. 274) of a party to the contract. The close relationship cases go back to the early King's Bench case (1677), long since repudiated in England, of Dutton *v.* Poole (2 Lev. 210; s. c., 1 Ventris, 318, 332). (Schermerhorn *v.* Vanderheyden, 1 Johns. 139.) The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit. "This is the farthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of Borland *v.* Welch (162 N. Y. 104, 110.)

The right of the third party is also upheld in, *thirdly,* the public contract cases (Little *v.* Banks, 85 N. Y. 258; Pond *v.* New Rochelle Water Co., 183 N. Y. 330; Smyth *v.* City of New York, 203 N. Y. 106; Farnsworth *v.* Boro Oil & Gas Co., 216 N. Y. 40, 48; Rigney *v.* N. Y. C. & H. R. R. R. Co., 217 N. Y. 31; Matter of International Ry. Co. *v.* Rann, 224 N. Y. 83; *cf.* German Alliance Ins. Co. *v.* Home Water Supply Co., 226 U. S. 220) where the municipality seeks to protect its inhabitants by covenants for their benefit and, *fourthly,* the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary, although he does not furnish the consideration. (Rector, etc., *v.* Teed 120 N. Y. 583; F. N. Bank of Sing Sing *v.* Chalmers, 144 N. Y. 432, 439; Hamilton *v.* Hamilton, 127 App. Div. 871, 875.) It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.

The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly in law or in equity from

the moral duty of the parent to make testamentary provision for a child. The contract was made for the plaintiff's benefit. She alone is substantially damaged by its breach. The representatives of the wife's estate have no interest in enforcing it specifically. It is said in Buchanan *v.* Tilden that the common law imposes moral and legal obligations upon the husband and the parent not measured by the necessaries of life. It was, however, the love and affection or the moral sense of the husband and the parent that imposed such obligations in the cases cited rather than any common-law duty of husband and parent to wife and child. If plaintiff had been a child of Mrs. Beman, legal obligation would have required no testamentary provision for her, yet the child would have enforced a covenant in her favor identical with the covenant of Judge Beman in this case. (De Cicco *v.* Schweizer, *supra.*) The constraining power of conscience is not regulated by the degree of relationship alone. The dependent or faithful niece may have a stronger claim than the affluent or unworthy son. No sensible theory of moral obligation denies arbitrarily to the former what would be conceded to the latter. We might consistently either refuse or allow the claim of both, but I cannot reconcile a decision in favor of the wife in Buchanan *v.* Tilden based on the moral obligations arising out of near relationship with a decision against the niece here on the ground that the relationship is too remote for equity's ken. No controlling authority depends upon so resolute a rule. In Sullivan *v.* Sullivan (*supra*) the grandniece lost in a litigation with the aunt's estate founded on a certificate of deposit payable to the aunt "or in case of her death to her niece," but what was said in that case of the relations of plaintiff's intestate and defendant does not control here, any more than what was said in Durnherr *v.* Rau (*supra*) on the relation of husband and wife, and the inadequacy of mere moral duty, as distinguished from legal or equitable obligation, controlled the decision in Buchanan *v.* Tilden. Borland *v.* Welch (*supra*) deals only with the rights of volunteers under a marriage settlement not made for the benefit of collaterals.

Kellogg, P. J., writing for the court below well said: "The doctrine of Lawrence *v.* Fox is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit the effect of that case." The court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended, would sue on it. The head note thus states the rule. Finch, J., in Gifford *v.* Corrigan (117 N. Y. 257, 262) says that the case rests upon that broad proposition; Edward T. Bartlett, J., in Pond *v.* New Rochelle Water Co. (183 N. Y. 330, 337) calls it "the general principle;" but Vrooman *v.* Turner (*supra*) confined its application to the facts on which it was decided. "In every case in which an action has been sustained," says Allen, J., "there has been a debt or duty owing by the promisee to the party claiming

to use upon the promise." (69 N. Y. 285.) As late as Townsend *v.* Rackham (143 N. Y. 516, 523) we find Peckham, J., saying that "to maintain the action by the third person there must be this liability to him on the part of the promisee." Buchanan *v.* Tilden went further than any case since Lawrence *v.* Fox in a desire to do justice rather than to apply with technical accuracy strict rules calling for a legal or equitable obligation. In Embler *v.* Hartford Steam Boiler Inspection & Ins. Co. (158 N. Y. 431) it may at least be said that a majority of the court did not avail themselves of the opportunity to concur with the views expressed by Gray, J., — who wrote the dissenting opinion in Buchanan *v.* Tilden, — to the effect that an employee could not maintain an action on an insurance policy issued to the employer, which covered injuries to employees.

In Wright *v.* Glen Telephone Co. (48 Misc. Rep. 192, 195) the learned presiding justice who wrote the opinion in this case said, at Trial Term: "The right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case." "The case at bar is decided upon its peculiar facts." (Edward T. Bartlett, J., in Buchanan *v.* Tilden.) But, on principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff $6,000 and he had accepted the devise, he would have become personally liable to pay the legacy and plaintiff could have recovered in an action at law against him, whatever the value of the house. (Gridley *v.* Gridley, 24 N. Y. 130; Brown *v.* Knapp, 79 N. Y. 136, 143; Dinan *v.* Coneys, 143 N. Y. 544, 547; Blackmore *v.* White, [1899] 1 Q. B. 293, 304.) That would be because the testatrix had in substance bequeathed the promise to plaintiff and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible but not obvious. The tendency of American authority is to sustain the gift in all such cases and to permit the donee-beneficiary to recover on the contract. (Matter of Edmundson's Estate, 259, Pa. 429, 103 Atl. Rep. 277.) The equities are with the plaintiff and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement.

The judgment should be affirmed, with costs.

Hogan, Cardozo and Crane, JJ., concur; Hiscock, Ch. J., Collin and Andrews, JJ., dissent. *Judgment affirmed.*

EDWARD G. GARDNER *v.* ARTHUR W. DENISON, ADMINISTRATOR

SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 20, 1914 – May 20, 1914

[*Reported in* 217 *Massachusetts,* 492]

RUGG, C. J. The facts upon which the plaintiff seeks to recover are these: His father, who was on friendly terms with the defendant's testator, Edward Gerrish, told the latter, in November, 1900, that the birth of a child was expected in his family. Gerrish, after several interviews, promised that if a boy should be born and named for him, Edward Gerrish Gardner, he would make some provision for the child. When the child was born, on January 1, 1901, he was named for the defendant's testator. On January 23, 1901, the plaintiff's father, at the request of Gerrish, wrote at the latter's dictation the following: "Jan. 23, — 1901. I, Edward Gerrish, promise to place in trust for Joseph A. Gardner's youngest son born Jan 1 — 1901, $10,000 for naming said son after me, Edward Gerrish Gardner." No specific sum of money had been mentioned before. Gerrish then signed the paper in the presence of the plaintiff's father, who since has had the possession and control of it. Gerrish later lived in the family of the plaintiff's father and showed special attention to the child, bestowing many gifts upon him and constantly referring to him as "my boy." He died in 1906, leaving an estate of more than $200,000, never having made any provision for the benefit of the plaintiff.

The privilege of naming a child is a valid consideration for a promise to pay money. The child has a direct and immediate interest in his name and is more affected by it than any one else. He loses the opportunity of receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him. The consideration moves in part from the child, although he is not in a position personally to yield an assent to the promise at the time it is made. It is a general rule that one who is not a party to a contract cannot bring an action on it even though it be made for his benefit. But the circumstances of the parties respecting the naming of a child are so peculiar, the nearness of the relation so great, and the obligation resting on the father and mother so important, and the consequences to the child so vital, that the inference may be drawn that the father is acting in the interests of and as agent for the son in making any contract as to giving him a name. Felton *v.* Dickinson, 10 Mass. 287, as interpreted by Marston *v.* Bigelow, 150 Mass. 45, 53. It was said in Eaton *v.* Libbey, 165 Mass. 218, at page 220, respecting the naming of a child, "The right of the parents is one which they have as the natural guardians of the child, and they may be presumed to act in the matter of its

interest. If, for exercising the right in a particular manner, they receive a reward which they recognize and treat as belonging to the child, it should be considered as its property, even if the parents could have kept the reward as their own."

This action is brought in the name of the son by his father as next friend. That is a relinquishment of the father's personal rights, as far as they ever might have been antagonistic to the son, and is equivalent to an assertion that whatever he did was done as agent for the son. The writing, signed by Gerrish, while inartificially expressed, in substance is a declaration by the defendant's testator that he acknowledges himself indebted in the sum of $10,000 for the privilege granted him of having the plaintiff bear his name. The words "in trust for," in the absence of any definition of the terms of any trust, may be treated as meaning nothing more than the expression of a general purpose that the promise was for the benefit of the plaintiff. No promisee being named in the instrument, all the attendant conditions may be examined for the purpose of determining to whom in fact the promise to pay was made. Such resort to extrinsic circumstances is not for the purpose of changing the writing, but of applying it to its proper object. Way *v.* Greer, 196 Mass. 237. Willett *v.* Smith, 214 Mass. 494, 497, and cases cited. Under all the circumstances we are of opinion that the plaintiff was entitled to go to the jury. *Exceptions sustained.*

JOHN HARTMAN, Defendant in Error, *v.* F. H. PISTORIUS et al., Plaintiffs in Error

Illinois Supreme Court, February 25, 1911

[*Reported in* 248 *Illinois,* 568]

Cartwright, J. This was a petition for certiorari to review a decree in favor of the defendant in error on a bill filed by him to foreclose a mortgage. On October 15, 1907, Brown & Osby entered into a written contract with F. H. Pistorius and C. W. Pistorius, plaintiffs in error, by which Brown & Osby agreed to pay to them $350, and to convey to them all right, title and interest in certain standing timber, subject to a mortgage of $1500, held by the defendant in error, which the plaintiffs in error agreed to pay. The plaintiffs in error on their part agreed to convey to Brown & Osby, eighty acres of land in Perry County (reserving, however, the timber thereon), subject to a mortgage of $1600, which was to be assumed by Brown & Osby. Nothing was done in pursuance of the agreement except that an affidavit of a former owner of Brown & Osby's land was procured, to the effect that he had made no transfers or conveyances of the timber except to their grantor and that there were no outstanding unsatisfied judgments against him.

On December 14, 1907, the contract between Brown & Osby and plaintiffs in error was abandoned by mutual consent, and they entered into a second agreement, written across the face of the copy of the original agreement, by which such original agreement was satisfied and discharged in consideration of $50 paid by Brown & Osby to plaintiffs in error and the delivery of a quit-claim deed of the eighty acres in Perry county by the plaintiffs in error to Brown & Osby.

Where one person makes a promise to another, based upon a valid consideration, for the benefit of a third person, such third person may maintain an action on the contract, and by virtue of that rule the purchaser of mortgaged premises who assumes the mortgage indebtedness as a part of the consideration for the conveyance to him becomes personally liable for such indebtedness and cannot defeat the mortgagee's right to hold him responsible by procuring a release from the mortgagor. (Dean *v.* Walker, 107 Ill. 540; Bay *v.* Williams, 112 id. 91; Ingram *v.* Ingram, 172 id. 287; Webster *v.* Fleming, 178 id. 140; Harts *v.* Emery, 184 id. 560.) These rules, however, cannot be applied to this case, for the reason that the plaintiffs in error never acquired title to the mortgaged property nor received or accepted a conveyance of it. There was a contract providing for a payment of $350 and conveyance of the timber in consideration of a conveyance of eighty acres of land, and if the contract had been executed and the considerations had passed the plaintiffs in error would have become liable for the mortgage debt, but the contract remained wholly executory and was canceled by mutual agreement.

The substance of the argument in support of the decree is that there was an agreement, which, if executed, would have been a benefit to defendant in error; that plaintiffs in error could have had the timber, if they wanted it, by complying with the contract; that it was their fault if they did not get the timber and they ought not to be allowed to take advantage of their own wrong in not acquiring it, and that, having had an opportunity of acquiring the timber, they ought not to have the benefit of their own voluntary act in abandoning or waiving their right. The argument is quite novel and does not appear to us to be sound. It is true that plaintiffs in error would have obtained title to the timber if Brown & Osby had paid the $350 and made a conveyance of it, which Brown & Osby had agreed to do if plaintiffs in error conveyed their Perry county land and both parties furnished merchantable titles, but the parties were as free to cancel and abandon the contract as they had been to enter into it. The defendant in error did not change his position in any particular and did not even notify either party of his willingness that the contract should be carried out. The plaintiffs in error did not agree to pay the mortgage debt in consideration of the making of the contract or the promise of Brown & Osby to make a convey-

ance, but the true consideration was the timber to be conveyed by a merchantable title and the cash payment. The parties were not bargaining for promises but for conveyances. (Tyler *v.* Young, 2 Scam. 444; Mason *v.* Wait, 4 id. 127; Davis *v.* McVickers, 11 Ill. 327; Thompson *v.* Shoemaker, 68 id. 256.) The plaintiffs in error were under no greater obligation to pay the mortgage debt than any other person would have been who had an option on the timber subject to the assumption of the mortgage debt.[1]

[1] The statement of facts in the opinion is abbreviated, and a portion of the opinion omitted.

In many cases, it is laid down broadly that after the creditor or beneficiary has been notified of the contract rescission is no longer possible, and that prior thereto it is permissible. See 2 Williston, Contracts, § 396 *b*. What is required in the way of assent or acting upon the promise is not defined. Doubtless in many jurisdictions if the third person had knowledge of the promise and made no objection he would be regarded as assenting. But in Crowell *v.* Currier, 27 N. J. Eq. 152 (s. c. on appeal *sub. nom.* Crowell *v.* Hospital, 27 N. J. Eq. 650), it was held that rescission was permissible because the third party had not altered his position, the court apparently requiring something like an estoppel to prevent a rescission; and in Wood *v.* Moriarty, 16 R. I. 201, a release by the promisee was held effectual, though the creditors had made a demand upon the promisor for the money, because the creditors "did not do or say anything inconsistent with their continuing to look to T (the original debtor) for the debt."

In a few cases, it has been held that though there has been no expression of assent by the third person no effective rescission or release can be made. Starbird *v.* Cranston, 24 Col. 20; Bay *v.* Williams, 112 Ill. 91; Cobb *v.* Heron, 78 Ill. App. 654, 180 Ill. 49; Henderson *v.* McDonald, 84 Ind. 149; Waterman *v.* Morgan, 114 Ind. 237; Rogers *v.* Gosnell, 58. 587; Thompson *v.* Gordon, 3 Strobh. 196. See also Knowles *v.* Erwin, 43 Hun, 150 affd. 124 N. Y. 623.

The almost universal doctrine that the beneficiary of a life insurance policy acquires a vested right of which he cannot be deprived subsequently is in accord. The numerous cases are collected in 3 Am. & Eng. Encyc. (2d ed.), 980.

In Trustees *v.* Anderson, 30 N. J. Eq. 365, 368, the Court say, "That the releases were executed and delivered merely in view of this suit, and for the purpose of preventing the complainants from having recourse in equity to Youngs, is proved, and, indeed, is admitted. That the grantor may, before suit brought against his grantee by the mortgagee to obtain the benefit of such a covenant of assumption, release or discharge it, and so prevent the mortgagee from obtaining any benefit of it, is established. Crowell *v.* Hospital of St. Barnabas. 12 C.E. Gr. 650. But the act of release or discharge, to be effectual, must be done *bona fide*, and not merely for the purpose of thwarting the mortgagee and depriving him of an equity to which he is entitled. Where a person, in consideration of a debt due from him, agrees with his creditor that he will, in discharge of it, pay the amount to the creditor of the latter, in discharge or on account of a debt due from the latter to him, though the agreement may be *bona fide* rescinded by the parties to it for considerations or reasons satisfactory to themselves, and without account or liability to the creditor who is not a party to it yet, if the promisee be insolvent, and the rescission be merely a forgiving of the debt for the mere purpose of defrauding the creditor of the promisee, or protecting the promiser against his liability, the rescission will not avail in equity." See also Youngs *v.* Trustees, 31 N. J. Eq. 290; Willard *v.* Worsham, 76 Va. 392.

JONES A. BOHANAN *v.* S. W. POPE, ET AL.

SUPREME JUDICIAL COURT OF MAINE, 1856

[*Reported in* 42 *Maine,* 93]

ON facts agreed from *Nisi Prius.*

This was an action of assumpsit brought upon a contract. The general issue was pleaded and joined, with a brief statement, setting forth that the plaintiff had been paid for the labor named in his writ by one Henry P. Whitney, or by reason of the judgment hereinafter mentioned, for whom he worked, and that said plaintiff recovered judgment against said Whitney in a suit for the same labor, and enforced his lien for said labor upon the logs he worked upon, by a sale of the same by D. G. Wilson, deputy sheriff, on the execution, at public auction.

It was agreed that the plaintiff was hired by Henry P. Whitney and worked upon said logs in hauling and cutting them. That before hiring him, Whitney showed him said contract, and plaintiff read it, and Whitney told him he had no other way of paying except through the contract; that there was due from Whitney to plaintiff for his labor $50.85, for which Whitney gave plaintiff an order on defendants; that plaintiff presented the order soon after to defendants, who refused to accept or pay it, and said order has never since been paid, unless by reason of a sale of said logs upon execution. Whitney put a four-ox team into the woods, and hauled logs in accordance with the contract. He did not drive the logs, but the defendants drove them and charged Whitney for the same in account. There has been no settlement between Whitney and defendants for the operation. Defendants have an account against Whitney for supplies, etc., under said contract, amounting to $1160.29, and a credit of $1020.73 in his favor, and there was a balance of account against Whitney at the date of the writ.

On May 22, 1853, plaintiff sued said Whitney for said sum of $50.85, claiming a lien for labor on the logs marked five notches and a cross, on which writ, the said mark of logs then in the boom, were attached May 27, 1853; the action was defaulted October term, 1853; and the execution duly issued, was seasonably put into the hands of D. G. Wilson, a deputy sheriff, who seized the said mark of logs, and duly advertised and sold the same at public auction, Nov. 3, 1853, for the sum of five dollars, to one Folsom, and discharged upon said execution the sum of ninety-six cents, and returned the execution satisfied for that amount and no more. And the same has never been satisfied or paid, except so far as may be by said sale of logs.

If, upon the above statement of facts, the full Court should be of opinion that the plaintiff can maintain his action, the defendants are to be defaulted; otherwise, the plaintiff is to become nonsuit.

George W. Dyer, for plaintiff.

George Walker, for defendants.

May, J. It is undoubtedly true, as a general proposition, that no action can be maintained upon a contract, except by some person who is a party to it. But this rule of law, like most others, has its exceptions; as, for instance, where money has been paid by one party, to a second, for the benefit of a third, in which case the latter may maintain an action against the first for the money. So, too, where a party for a valuable consideration stipulates with another, by simple contract, to pay money or do some act for the benefit of a third person, the latter, for whose benefit the promise is made, if there be no other objection to his recovery than a want of privity between the parties, may maintain an action for a breach of such engagement. This principle of law is now well established both in this State and Massachusetts. Hinckley *& al. v.* Fowler, 15 Maine, 285; Felton *v.* Dickinson, 10 Mass. 287; Arnold *& al. v.* Lyman, 17 Mass. 400; Hall *v.* Marston, 17 Mass. 575; Carnegie *v.* Morrison, 2 Met. 381; and Brewer *v.* Dyer, 7 Cush. 337.

In this last case, it is said by Bigelow, J., as the opinion of the full Court, that the rule "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; nor upon the reason, that the defendant by entering into such an agreement, has impliedly made himself the agent of the plaintiff; but upon the broader and more satisfactory basis, that the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

But while the law does this in favor of a third person, beneficially interested in the contract, it does not confine such person to the remedy which it so provides; he may, as the authority last cited shows, if he choose, disregard it and seek his remedy directly against the party with whom his contract primarily exists. But if he does so, then such party may recover against the party contracting with him, in the same manner as if the stipulation in the contract had been made directly with him and not for the benefit of a third person. The two remedies are not concurrent but elective, and an election of the latter implies an abandonment of the former.

Applying these principles to the facts in the present case, it appears that the plaintiff, he being one of "the hired men" whom the defendant by the terms of his contract with Whitney was to pay, might, if he had chosen so to do, have brought his action in the first instance against the defendant, relying upon the beneficial interest secured to him in said contract; or, disregarding this remedy, he might have elected to rely upon the original undertaking of Whitney, and therefore have proceeded against him. The facts show that he elected the latter mode, and having done so, he must be regarded as having thereby consented that Whitney should be at liberty to

avail himself of the funds, which he had set apart in the contract for the payment of the plaintiff (if any such there were), in order that he might be able by means of such funds, if necessary, to satisfy such judgment as the plaintiff might recover against him. By such election the plaintiff relinquished all claim upon the particular funds appropriated for his benefit and gave to Whitney the control and disposition thereof.

This defence, avoiding and repelling, as it does, the promise declared on, may properly be shown under the general issue. Gould's Pleading c. 6, §§ 47, 48. *Plaintiff nonsuit.*[1]

TENNEY, C. J., and HATHAWAY, APPLETON, and GOODENOW, JJ., concurred.

JOHN H. ARNOLD ET AL., EXRS., ETC., APPELLANTS, *v.* CHARLES H. NICHOLS, IMPLEADED, ETC., RESPONDENT

NEW YORK COURT OF APPEALS, January 24–February 1, 1876

[*Reported in* 64 *New York,* 117]

EARL, J. For some years prior to the 15th day of August, 1867, the defendant Bowen had been engaged in the city of New York in the business of importing and dealing in fancy goods, and on that day the plaintiff's testator, Hinman, loaned to him to be used in his business the sum of $2,000. Bowen continued in business alone until January, 1868, when he formed a copartnership with the defendant Nichols, and Bowen and Nichols, under the firm name of J. M. Bowen & Co., continued to carry on the business until May, 1869, when they dissolved. At the time of the formation of the copartnership, Bowen transferred his individual business assets to the firm of J. M. Bowen & Co., and in consideration thereof, the firm assumed and agreed to pay certain specified debts of Bowen, among which was Hinman's debt for the money loaned as above stated. It was expected at the time that the assets would exceed the debts assumed by the firm by at least $30,000; and this excess of $30,000 was to be credited to Bowen on the books of the firm as his share of capital to be distributed. The assets were not as large as expected, but were shown to be more than sufficient to pay all the debts assumed. They were first to be used to pay the debts, and the balance whatever it might be, was to be credited to Bowen.

Bowen transferred to the firm the assets to which his creditors had the right to look for the payment of their claims, and hence the promise of the firm to pay such claims must be deemed to have

[1] Henry *v.* Murphy, 54 Ala. 246; Hall *v.* Alford 49 S. W. Rep. 444 (Ky.); Brewer *v.* Dyer, 7 Cush. 339; Warren *v.* Batchelder, 16 N. H. 580; Wood *v.* Moriarty, 15 R. I. 518, 522; Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556, *acc.*; United States *v.* Illinois Surety Co. 141 C. C. A. 409; Hopkins *v.* Warner, 109 Cal. 133; Stanton *v.* Kenrick, 135 Ind. 382, 389; Stephany *v.* More, 82 N. J. L. 186; Poe *v.* Dixon, 60 Ohio St. 124, 129; Feldman *v.* McGuire, *contra.*

been made for their benefit. It was not made to exonerate Bowen from the payment of his debts, and not primarily nor directly for his benefit, as his property was to be taken to pay the debts, and he was still to remain liable as one of the principals to pay them. This case is, therefore, unlike the case of Merrill *v.* Green, 55 N. Y. 270, and the action is maintainable upon the principles laid down in the case of Lawrence *v.* Fox, 20 N. Y. 268, and also recognized in Burr *v.* Beers, 24 N. Y. 178; Thorp *v.* Keokuk Coal Company, 48 N. Y. 253, and Claflin *v.* Ostrom, 54 N. Y. 581. Hinman had the right to adopt the promise made expressly for his benefit.

The defendant Nichols alleged in his answer that he was induced to enter into the alleged agreement by the fraud of Bowen, but he did not allege that he had rescinded the agreement on that account, or that he had ever suffered any damage on account thereof. Upon the trial he offered to prove that he was induced to enter into the agreement by fraud, and the Court excluded the evidence. This ruling was right. When Nichols discovered that he had been defrauded into making the agreement, he could have repudiated the agreement on that ground, given up his interest in the assets transferred to the firm and placed them again in the hands of Bowen. A creditor could not adopt the agreement which Bowen had made for his benefit, without taking it subject to any infirmity which attached to it, and subject to any assault which Nichols could make upon its validity.[1] But Nichols could not retain the fruits of the agreement and refuse on account of fraud to bear its burdens. Again, fraud could, in no aspect of the case, furnish a total or partial defence to the action, as the firm had more than sufficient assets transferred to it by Bowen, to pay all the debts assumed. Hence there was no fraud affecting Hinman's claim or right of recovery.

[1] Green *v.* Turner, 80 Fed. Rep. 41; 86 Fed. Rep. 837; Benedict *v.* Hunt, 32 Ia. 27; Maxfield *v.* Schwartz, 45 Minn. 150; Ellis *v.* Harrison, 104 Mo. 270, 278; Saunders *v.* McClintock, 46 Mo. App. 216; American Nat. Bank *v.* Block, 58 Mo. App. 335; Wise *v.* Fuller, 29 N. J. Eq. 257; Moore *v.* Ryder, 65 N. Y. 438; Trimble *v.* Strother, 25 Ohio St. 378; Osborne *v.* Cabell, 77 Va. 462, *acc.* But see Fitzgerald *v.* Barker, 96 Mo. 661; Klein *v.* Isaacs, 8 Mo. App. 568.

Similarly mistake of the contracting parties is a defence against the third person. Episcopal Mission *v.* Brown, 158 U. S. 222; Jones *v.* Higgins, 80 Ky. 409; Bogart *v.* Phillips, 112 Mich. 697; Rogers *v.* Castle, 51 Minn. 428; Gold *v.* Ogden, 61 Minn. 88; Bull *v.* Titsworth, 29 N. J. Eq. 73; Stevens Inst. *v.* Sheridan, 30 N. J. Eq. 23; O'Neill *v.* Clark, 33 N. J. Eq. 444; Green *v.* Stone, 54 N. J. Eq. 387; Crow *v.* Lewis, 95 N. Y. 423; Wheat *v.* Rice, 97 N. Y. 296, or failure of consideration. Clay *v.* Woodrum, 45 Kan. 116; Amonett *v.* Montague, 75 Mo. 43; Judson *v.* Dada, 79 N. Y. 373, 379; Dunning *v.* Leavitt, 85 N. Y. 30; Crow *v.* Lewis, 95 N. Y. 423; Gifford *v.* Father Matthew Soc., 104 N. Y. 139; Osborne *v.* Cabell, 77 Va. 462. But see Hayden *v.* Snow, 9 Biss. 511; 14 Fed. Rep. 70; s. c. *sub nom.*; Hayden *v.* Devery, 3 Fed. Rep. 782; Blood *v.* Crew Levick Co., 177 Pa. 606.

Non-performance of his promise by the promisee was held a defence to an action by the third person in Episcopal Mission *v.* Brown, 158 U. S. 222; Pugh *v.* Barnes, 108 Ala. 167; Stuyvesant *v.* Western Mortgage Co., 22 Col. 28, 33; Miller *v.* Hughes, 95 Ia. 223; Dunning *v.* Leavitt, 85 N. Y. 30. See also Willard *v.* Wood, 164 U. S. 502, 521; Loeb *v.* Willis, 100 N. Y. 231. But see apparently, *contra*, Cress *v.* Blodgett, 64 Mo. 449; Commercial Bank *v.* Wood, 7 W. & S. 89; Blood *v.* Crew Levick Co., 177 Pa. 606; Fulmer *v.* Wightman, 87 Wis. 573.

The charge of the judge at the trial was free from any just criticism. It was, that if the jury found that there was an agreement between Bowen and Nichols in entering into copartnership, that J. M. Bowen & Co., the new firm, should take the business assets of Bowen, and in consideration thereof pay the specified liabilities of Bowen, the plaintiffs were entitled to recover, and that if they found there was not such an agreement, they were not entitled to recover. This charge fairly covered the law of the case.

We have considered the other exceptions to which our attention was called upon the argument, and they are so clearly without foundation as to require no particular notice.

The order of the General Term must be reversed, and the judgment entered upon the verdict affirmed, with costs.

All concur. *Order reversed and judgment accordingly.*

SECTION II

ASSIGNMENT OF CONTRACTS

MOWSE *v.* EDNEY

IN THE QUEEN'S BENCH, EASTER TERM, 1600

[*Reported in Rolle's Abridgment,* 20 *placitum,* 12]

IF A is indebted to B by bill and B indebted to C, and B in payment of his debt to C assigns A's bill to him, and before the day for the payment of the money A comes to C and promises him that if he will forbear to enforce the payment of the money then he, A, will pay him; upon which C forbears. Still there is no consideration to maintain any action on this promise, because notwithstanding the assignment of the bill, still the property of the debt remains always in the assignor.

ALLEN'S CASE, 1584

[*Reported in Owen,* 113]

A *scire facias* issued out in the name of the Queen to shew cause why execution of a debt which is come to the Queen by the attainder of J. S. should not be had. The defendant pleaded that the Queen had granted over this debt by the name of a debt which came to her by the attainder of J. S. and all actions and demands, etc., upon which the plaintiff demurred. And the question was, if the patentee might sue for this in the name of the Queen, without speciall words.

And two precedents were cited that he may, 1 Pasch., 30 Eliz. rot. 191, in the Exchequer, where Greene, to whom a debt was due, was attainted, and the Queen granted over this debt, and all actions and demands, and a *scire facias* was sued for him in the name of the Queen, also in the 32 Eliz. rot. 219.

Mabb of London was indebted by bond, and the debt came to the Queen by the attainder, and she granted it to Bones, and all actions and demands, and a *scire facias* was issued out in the name of the Queen. And the principal case was adjourned. But the patentee had expressed words to sue in the name of the Queen, although it was not so pleaded.[1]

HARVEY *v.* BATEMAN, 1596

[*Reported in Noy,* 52]

If a man assign an obligation to another for a precedent debt due by him to the assignee, there, that is not maintenance; but if he assign it for a consideration then given by way of contract, that is maintenance.[2]

BACKWELL *v.* LITCOTT

In the King's Bench, Hilary Term, 1669

[*Reported in* 2 *Keble,* 331]

Nota, On motion of Jones to stay a trial of bankruptsie of one Colonell, it was said, that if J. be obliged to J. S. and he before bankrupsie assign the bond, this is liable to after-bankrupsie of J. S. being onely suable in his name, *per* Keeling and Twisden.

[1] "Where a bond is assigned over with a letter of attorney therein to sue, and a covenant not to revoke, but that the money shall come to the use of the assignee, although the obligee be dead, yet the court will not stay proceedings in a suit upon the bond in the obligee's administrator's name, though prosecuted without his consent; for that those assignments to receive the money to the assignee's own use, with covenants not to revoke, and also with a letter of attorney in them, although they do not vest an interest, yet have so far prevailed in all courts, that the grantee hath such an interest that he may sue in the name of the party, his executors or administrators." Lilly's Practical Register, 48 (1710).

[2] See for further early authorities on the assignment of choses in action, 3 Harv. L. Rev. 336, by Professor Ames.

CROUCH *v.* MARTIN & HARRIS, ET AL

IN CHANCERY, MICHAELMAS TERM, 1707

[*Reported in* 2 *Vernon,* 595]

THE plaintiff lent Arthur Harris, late husband of the defendant, 100*l.* on Bottom-Rhea; and as a farther security assigned to the plaintiff the wages that would become due to him in the voyage to the Indies, as chirurgeon of the ship at 4*l.* 10*s.* per month; the ship returned safe to London, and 145*l.* became due on the Bottom-Rhea bond. Arthur Harris died in the voyage; the defendant, his widow, took out administration; and there being a bond given by her husband on her marriage to leave her 400*l.* if she survived him, she confessed judgment thereon, and insisted that judgment ought to be first paid, and the wages due to the husband applied to that purpose.

Per cur. Seamen's wages are assignable, and the assignment specifically binds the wages; and in truth the advancing the 100*l.* on the credit of the wages is, as it were, paying the wages beforehand; and the seaman or his widow must not have his wages twice.

It is a *chose en action,* being due by contract, although the service not then done, and a *chose en action* is assignable in equity upon a consideration paid.

ROW *v.* DAWSON

IN CHANCERY, November 27, 1749

[*Reported in* 1 *Vesey, Senior,* 331]

TONSON and Cowdery lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz. "Out of the money due from Horace Walpole out of the Exchequer, and what will be due at Michaelmas pay to Tonson 400*l.*, and to Cowdery 200*l.* value received."

Gibson became bankrupt: and the question was, whether the defendants Tonson and the executors of Cowdery were first entitled by a specific lien upon this sum due to the estate of Gibson or whether the plaintiffs, the assignees under the commission, are entitled to have the whole sum paid to them; it being insisted for them, that this draft was in the nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy in law or equity.

LORD CHANCELLOR. At first I a little doubted about my own jurisdiction: and whether the plaintiffs ought not to have gone into the Exchequer, as being a court of revenue; for this is not a personal credit given to, or demand upon the officer, but to be paid out of that money issued out of the Exchequer to the officer; and this

is on warrant, to be paid out of the revenue of the crown for public services. But there is something in the present case delivering it from that; the officer admits, he has received a sum of money applicable to this demand, which brings it to the old case of a liberate, which a person has under the great seal for the payment of money; upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft; not to pay generally, but out of his particular fund, which creates no personal demand; therefore not a draft on personal credit to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer on the agent of his regiment to be paid out of his growing subsistence. Then what is it, for it must amount to something? It is an agreement for valuable consideration beforehand to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a chose in action, this Court does; and any words will do; no particular words being necessary thereto. In the case of a bond it may be assigned in equity for valuable consideration, and good although no special form used. Suppose an obligee receives the money on the bond, and there is wrote on the back of it "Whereas I have received the principal and interest from such a one, do you the obligor pay the money to him;" this is just that case; only it is not a debt arising from specialty: therefore like an assignment of rent by direction to a tenant or steward to pay so much of a year's rent to a third person. The case of Ryal *v.* Rowles, *post,* now under the consideration of the Court, occurred to me. There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission: and it is clear, that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause in the statute, J. 1. But this is clear of that doubt, because this was a debt to Gibson without any specialty. This draft, which amounts to an assignment, is deposited with the officer Swinburn, and therefore is attached immediately upon it: so that Swinburn could not have paid this money to Gibson, supposing he

had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration.[1]

WINCH *v.* KELEY

In the King's Bench, Hilary Term, 1787

[*Reported in* 1 *Term Reports,* 619]

Indebitatus assumpsit for work and labor, money paid, laid out, and expended, money lent, and on an account stated.

The defendant pleaded. That after the day of making the promises, etc., the plaintiff became a bankrupt, etc., and that his commissioners assigned over his effects to the assignees, etc., by virtue of which he the defendant is chargeable to pay the sums of money mentioned in the declaration to the assignees, etc.

The replication admitted the matters contained in the plea to be true; and as to all the promises in the declaration mentioned, and all the sums therein contained, except as to 73*l.* 12*s.* 9*d.* parcel, etc., the plaintiff acknowledged that he would not further prosecute. Then the replication stated that as to the above seen the plaintiff had made an assignment of his claim thereto to one Searle in satisfaction of or security for a valid debt and that this action was prosecuted for and on behalf of the said Searle.

To this replication the defendant demurred.

Ashurst, J. The cases which have been cited by the plaintiff's counsel go a great way in determining this question. It is true that formerly the courts of law did not take notice of an equity or a trust; for trusts are within the original jurisdiction of a court of equity: but of late years, it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned: but this Court will take notice of a trust, and consider who is beneficially interested, as in Bottomley *v.* Brooke, where the Court suffered the defendant to set off a debt due from Mrs. Chancellor in the same manner as if the action had been brought by her. The only difference between that case and this is, that there the plaintiff himself was not originally interested in the debt, but this plaintiff was: but that does not make any essential difference;

[1] See also Squib *v.* Wyn, 1 P. Wms. 378; Chandos *v.* Talbot, 2 P. Wms. 601, 607; Carteret *v.* Paschal, 3 P. Wms. 197; Tourville *v.* Naish, 3 P. Wms. 307; *Ex parte* Byas, 1 Atk. 124; Brown *v.* Roger Williams, 1 Atk. 160; Unwin *v.* Oliver, 1 Burr. 481; Sullivan *v.* Visconti, 68 N. L. J. 543.

because if it be once established that this Court will take notice of trusts, it is immaterial whether the person who sues were originally a trustee or afterwards becomes so. Nor is it material at what time they became a trustee; for whether he became such by the assignment, or was so originally, it is sufficient to say that he is a trustee now, and as such has a right to maintain this action. If this had been a fraudulent assignment, it would have raised a different question: but on these pleadings it must be taken to have been assigned for a valuable consideration. The case of Webster and Scales is in point; and on the authority of that and on the other cases cited, I am of opinion that the plaintiff may recover.[1]

DEERING *v.* FARRINGTON

In the King's Bench, Easter Term, 1674

[*Reported in* 1 *Modern,* 113]

An action of covenant, declaring upon a deed by which the defendant *assignavit et transposuit* all the money that should be allowed by any order of a foreign State to come to him in lieu of his share in a ship.

Tompson moved, that an action of covenant would not lie, for it was neither an express nor an implied covenant. 1 Leon. 179.

Hale, C. J. You should rather have applied yourself to this, viz.: Whether it would not be a good covenant against the party? As if a man doth demise, that is an implied covenant; but if there be a particular express covenant, that he shall quietly enjoy against all claiming under him, that restrains the general implied covenant; but it is a good covenant against the party himself. If I make a lease for years reserving rent to a stranger, an action of covenant will lie by the party to pay the rent to the stranger. Then it was said, it was an assignment for maintenance.

Hale, C. J. That ought to have been averred.

Then it was further said, That an assignment transferring when it cannot transfer, signifies nothing. — Hale, C. J. But it is a covenant, and then it is all one as if he had covenanted that he should have all the money that he should recover for his loss in such a ship. —Twisden, J., seemed to doubt.—But judgment.[2]

[1] The statement of the pleadings is abbreviated, and a concurring opinion of Buller, J. omitted.

[2] In a report of the same case in 3 Keb. 304, Lord Hale is reported as saying: "Though assign, set over and transpose, do not amount to covenant against an eign title, yet against the covenantor himself it will amount to a covenant, as a covenant against all claiming by and under me . . . and this is no maintenance unless it be specially awarded to be so within the statute, for it doth not transfer the duty, but is a contract to transfer the benefit, as covenant to transfer."

HARDING *v.* HARDING AND ANOTHER

IN THE QUEEN'S BENCH DIVISION, JULY 13, 15, 1886

[*Reported in* 17 *Queen's Bench Division,* 442]

APPEAL from the judgment of the judge of the county court of Loughborough.

The facts were as follows: —

The defendants were the executors of James Harding, and one of the residuary legatees under James Harding's will was George Harding, the father of the plaintiff. George Harding lived in Australia, and the defendants, after realizing the estate, sent him an account headed, "Estate of the late James Harding, deceased, in account with George Harding," in which, after crediting him with his share of the estate and debiting him with sums of money paid to him on account, a balance of 28*l.* 19*s.* 3*d.* was shown to be due to him from the estate. George Harding received the account, and on the 4th of September, 1884, wrote at the foot of it words which, so far as is material to the present case, were as follows: "I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shown in the above statement, less the ten pounds received by me in Australia. George Harding, Sydney."

The account, with this writing at the foot of it, was sent home by George Harding to his daughter Laura, the plaintiff, who kept it for some time, but in the month of October, 1885, communicated it to the defendants. At that time George Harding could not be, nor has he since been, heard of, and the defendants wrote two letters to the plaintiff's solicitors, the effect of which was that they would comply with the direction as to the payment of the money if they were satisfied that the plaintiff could give them a proper receipt. Eventually, however, they declined to pay her the money, and the plaintiff brought an action in the county court for the amount and recovered judgment. The defendants appealed.

Sills, for the defendants.

Toller, for the plaintiff.

WILLS, J. I am of opinion that the decision of the county court judge was right. It was argued for the defendants that this was a mere equitable assignment, and that having been made in favor of a volunteer without consideration, equity would not enforce it. But I think that a misapprehension of the rules of Courts of Equity is involved in that proposition. The rule in equity comes to this; that so long as a transaction rests in expression of intention only, and something remains to be done by the donor to give complete effect to his intention, it remains uncompleted, and a Court of Equity will not enforce what the donor is under no obligation to fulfill. But when the transaction is completed, and the donor has created a trust in favor of the object of his bounty, equity will interfere to enforce

it. The reason why equity will not interfere in favor of a mere volunteer, but requires a valuable consideration for the transaction, is that in such a case there is nothing wrong in the donor changing his mind and withholding from the object of his liberality the contemplated benefit. But if there is value given on the one side in exchange for the donor's intention, then there is a contract, or something approaching to a contract, between the parties, and the donor cannot withdraw from his intention. We were much pressed with the authority of Holroyd *v.* Marshall, 10 H. L. C. 191, 33 L. J. (Ch.) 193, but we think that the doctrine there laid down does not apply to a case like the present. In that case the goods which were the subject of the transaction were things capable of being conveyed by a legal title, things as to which the grantor was competent to do something further to complete the legal title of the grantee; and it was held that he was bound to do so, as he had had consideration. When, however, the subject-matter of the transaction is an equitable right or estate, and a legal title cannot be given; then if the settlor has done all in his power and nothing remains to be done by him, equity regards it as though he had completed the legal title, and gives effect to his intention.

In the present case it was proposed to assign a sum of money due from the trustees, the defendants; and probably before the Judicature Act it would have been impossible to give a legal title to Laura Harding, so as to enable her to sue in her own name in respect of this right of action; she could have maintained a suit in equity, but the legal title could not have been completed in her. Now it can be done; and it seems to me that the legal title has been so completed by the notice signed by George Harding and sent by him to the plaintiff. If it is to be regarded as an equitable assignment, he has done all that he could to make it complete; if, as a legal assignment, he has completed it; and under s. 25, sub-s. 6 of the Judicature Act, 1873, the assignee of a chose in action may sue in his own name, the law as to the necessity for a consideration not applying, as it seems to me, if the assignment is completely made. If the assignment had been made by deed, the question of consideration could not arise; and in my opinion the question of want of consideration has no application to such a case as the present. But there is a further fact in the present case; George Harding authorized his daughter to communicate his letter to the trustees; she did so, and the trustees assented to the assignment. It seems to me that that fact carries us a step further, and imports into the case another doctrine of equity; that under such circumstances the assignee is regarded as the *cestui que trust* of the debtor, if the debtor has assented to the obligation. The correspondence shows that the trustees assented to take the plaintiff as their *cestui que trust*, and the facts ought to have satisfied them that she had the power to give them a proper receipt. The authority given by George Harding to receive

the money was unrevoked, and the plaintiff was competent to give an effectual discharge.[1] I think that even without the assent of the trustees there was a good and valid assignment to the plaintiff; but with such assent arises the second doctrine that I have referred to, which settles any possible question as to her right to maintain this action.

It is further objected that the action cannot be maintained against the defendants personally, but should have been brought against them as executors; that objection I think untenable. The defendants had stated an account acknowledging the debt, and there is ample authority for saying that they can be sued in their personal capacity.

Appeal dismissed.[2]

ELLEN G. COOK *v.* CHARLES M. LUM, Administrator

New Jersey Supreme Court, June Term, 1893

[*Reported in* 55 *New Jersey Law,* 373]

Beasley, C. J. This case stands before the court on a special verdict, and the problem to be solved involves the legal efficacy of a gift of money.

The circumstances were these: The deceased, Ellen G. Green, who is here represented by her administrator, who is the defendant on this record, deposited with one Kase the sum of $2,316, who thereupon gave to the said Ellen a paper containing in column eight several sums in figures, which were footed up and amounted to the sum just specified. The paper was dated "July 26th, 1890," and there was no other writing upon it.

After finding the foregoing facts, the special verdict proceeds as follows: "And the jurors aforesaid further say that except said paper, said John H. Kase never gave to said Ellen Green any evidence of indebtedness from himself to her for said deposit. . . . That said Ellen Green did actually deliver said paper into the hands of said Ellen G. Cook shortly before her, said Ellen Green's, death. That said Ellen Green delivered said paper into the hands of said Ellen G. Cook, with the intention of thereby giving to said Ellen G. Cook, for herself, the money in the hands of said John H. Kase." It was further found that Kase was not informed of the gift until several weeks after the death of the donor.

[1] Walker *v.* Bradford Bank, 12 Q. B. D. 511; Harding *v.* Harding, 17 Q. B. D. 442; Henderson Nat. Bank *v.* Lagow, 3 Ky. L. Rep. 173, 174; Phipps *v.* Bacon, 183 Mass. 5, 66 N. E. 414; Coe *v.* Hinkley, 109 Mich. 608, 67 N. W. 915; Hickman *v.* Chaney, 155 Mich. 217, 118 N. W. 993; Richardson *v.* Mead, 27 Barb. 178; Merrick *v.* Brainard, 38 Barb. 574; Allen *v.* Brown, 51 Bard. 86; Sheridan *v.* Mayor, 68 N. Y. 30; Levins *v.* Stark, 57 Or. 189, 110 Pac. 980; Buxton *v.* Barrett, 14 R. I. 40; Pearce *v.* Wallis, 58 Tex. Civ. App. 315, 124 S. W. 496, *acc.* But see *contra*, note, Brownlow & G. 40; Patterson *v.* Williams, Lloyd & G. temp. Plunket, 95; Hill *v.* Sheibley, 64 Ga. 529; Tallman *v.* Hoey, 89 N. Y. 537.

[2] Grantham, J. delivered a concurring opinion.

The general legal principle regulating the subject of gifts of choses in action has long been established. It is to the effect that with respect to things both tangible and intangible, mere words of donation will not suffice. With regard to the former class—that is, things corporeal — there must be, in addition to the expression of a donative purpose, in actual tradition of the *corpus* of the gift whenever, considering the nature of the property and the circumstances of the actors, such a formality is reasonably practicable. In some instances, when the situation is incompatible with the performance of such ceremony, resort may be had to what has been called a symbolical delivery of the subject.

Touching things in action, as there can be no actual delivery of them, the legal requirement is, that the donor's voucher of right or title must be surrendered to the donee. Such surrender is deemed equivalent to an actual handing over of things corporeal.

To this extent the law of the subject is neither doubtful nor obscure. The difficulty supervenes as soon as the attempt is made to apply these rules to the ever-variant conditions of the cases that are being presented for judicial examination. Even when the thing given has been a personal chattel, whether certain acts show a purpose to give consummated by a delivery of it, has often been, and doubtless will be, a vexed question. The uncertainty in construing the circumstances is even greater than we have rights of action to deal with. There are a multitude of decisions which demonstrate the embarrassment inherent in this class of cases; but as these decisions, while all acknowledging the rules just indicated, are in truth nothing more than interpretations, respectively, of the facts of the particular case, and as such facts are unlike the juncture now present, it would serve no useful purpose to review or cite them in detail. There is no observed precedent, so far as circumstances are concerned, for the matter now before us. Many of these decisions may be found in the Encyclopædia of English and American Law, tit. "Gifts," and any person who will examine this long train of cases will at once perceive that the principal difficulty has been to decide whether the evidence in hand in the given case showed a delivery of the subject of the gift in a legal point of view.

But this was a maze not without its clue, for the cardinal principle as to what constituted a delivery that would legalize a gift was on all sides admitted and was generally applied. The test was this, that the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action. The rule does not require that the title of the donee should be formally perfect, although in the earliest decisions this appears to have been indispensable, but now the law is otherwise settled. Thus, the delivery, with donative intention, of non-negotiable notes or bonds affords an apt illustration of the rule in both of its aspects.

Such gifts are admittedly valid, although the title of the donee is not ceremoniously perfect, as it wants the finishing touch of a written assignment; but the transaction is validated on the ground that it is possessed of the all-important quality of depriving the donor of all control over the property. After the delivery of such bond or note, the donor can exercise not a single act of ownership with respect to it; he cannot sue upon it nor collect it, nor regain its possession. And it is this absolute abnegation of power that, in a legal point of view, makes the transaction enforceable.

This is the crucial test, and if it be applied to the case in hand this donation is not to be sustained. The reason is that the donor parted with nothing that was essential to his own dominion over the moneys in question. After she had transferred the slip of paper in question her dominion over her deposits remained plainly intact. The paper was in no sense a voucher of the receipt of the moneys; they could have been collected without its production; nor was it necessary to a suit for their recovery. It is impossible to believe that the parties intended this slip of paper, which contained nothing but a line of figures and an addition of them, as a testimonial showing the transaction to which it immediately appertained. It does not appear how the donor became possessed of this paper, but construed intrinsically it has the appearance of having been used for the temporary purpose of showing the aggregate of the several sums on deposit, and it carries on its face no indication whatever that it was drawn or given as a voucher of the indebtedness of the person making it. The delivery of so insignificant a paper as this cannot, in our opinion, operate to legalize the transaction.

The defendant is entitled to judgment.[1]

EDWARD HERBERT *v.* GEORGE W. BRONSON AND TRUSTEE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 25, 1878

[*Reported in* 125 *Massachusetts,* 475]

TRUSTEE PROCESS. Writ dated December 31, 1877, and served on January 1, 1878. The city of Fall River, summoned as trustee, answered that at the date of service upon it, it had in its hands belonging to the defendant the sum of $248. James Murphy, Jr., appeared as claimant of the funds in the hands of the trustee by virtue of an

[1] Compare Sewell *v.* Moxsy, 2 Sim. N. S. 189; Airey *v.* Hall, 3 Sm. & G. 315; Walker *v.* Bradford Bank, 12 Q. B. D. 511; *Re* Richardson, 30 Ch. D. 396; Maynard *v.* Maynard, 105 Me. 567; Jackson *v.* Sessions, 109 Mich. 216; Murphy *v.* Bordwell, 83 Minn. 54; Smither *v.* Smither, 30 Hun, 632; Matson *v.* Abbey, 70 Hun, 475, 141 N. Y. 179; *Re* Huggins' Est. 204 Pa. 167; Read *v.* Long, 4 Yerg. 68; Cowen *v.* First Nat. Bank, 94 Tex. 547.

As to gifts of choses in action, having tangible form as bonds, policies of insurance, Savings Bank books, lottery tickets, etc., see Ames's Cas. on Trusts (2d ed.), 107–163; 1 Williston, Contracts, § 439.

assignment, dated April 9, 1877, to him from the defendant, of "all claims and demands I now have, and all which, at any time between the date hereof and the ninth day of April next, I may and shall have against the city of Fall River, for all sums of money due and for all sums of money and demand which, at any time between the date hereof and the said ninth day of April next, may and shall become due to me, for services as school teacher."

At the trial in the Superior Court, before GARDNER, J., without a jury, it appeared that, at the date of the assignment, the defendant was employed as a school teacher by the city, under a contract, from September, 1876, to June 30, 1877; that on September 1, 1877, the defendant was hired by a new contract from that date until June 30, 1878; and that nothing was due the defendant on September 1, 1877, upon his prior contract, but that he had been paid in full. It was admitted by the plaintiff that the assignment was founded on a valid consideration; that it was duly recorded; and that there was due the assignee from the defendant a larger sum than was in the hands of the trustee. The claimant contended that he was entitled to all sums earned by the defendant while in the employ of the city, during the year covered by the assignment.

The judge found as a fact, that the contract, under which the defendant was employed when the assignment was made, terminated on June 30, 1877, and that a new contract was entered into between the defendant and the trustee on September 1, 1877; ruled that the assignment did not cover funds earned since September 1, 1877, as against the trustee process; and ordered the trustee to be charged. The claimant alleged exceptions.

H. A. Dubuque, for the claimant.

H. K. Braley, for the plaintiff, was not called upon.

BY THE COURT. It is well settled that money to be earned hereafter under a new engagement is not assignable. Mulhall *v.* Quinn, 1 Gray, 105; Hartley *v.* Tapley, 2 Gray, 565; Twiss *v.* Cheever, 2 Allen, 40. *Exceptions overruled.*[1]

[1] Clanton Bank *v.* Robinson, 195 Ala. 197; Raulins *v.* Levi, 232 Mass. 42; Heller *v.* Lutz, 254 Mo. 704 Rodijkeit *v.* Andrews 74 Ohio St. 104; Lehigh R. R. Co. *v.* Woodring, 116 Pa. 513, *acc.;* Tailby *v.* Official Receiver, 13 A. C. 523; Edwards *v.* Peterson, 80 Me. 367, *contra.*

"It makes no difference, if instead of [an assignment of] a debt now due, it is of money expected to become due at some future time to the assignor, it appearing that there was an existing contract upon which the debt might arise." Cutts *v.* Perkins, 12 Mass. 212. See also in accord, Harrop *v.* Landers Co., 45 Conn. 561; Walton *v.* Horkan, 112 Ga. 814; Metcalf *v.* Kincaid, 87 Ia. 443; Farrar *v.* Smith, 64 Me. 74; Emerson *v.* Railroad, 67 Me. 387; Knevals *v.* Blauvelt, 82 Me. 458; Shaffer *v.* Union Mining Co., 55 Md. 74; Crocker *v.* Whitney, 10 Mass. 316; Gardner *v.* Hoeg, 18 Pick. 168; Lamman *v.* Smith, 7 Gray, 150; Kane *v.* Clough, 36 Mich. 436; Garland *v.* Harrington, 51 N. H. 409; Runnells *v.* Bosquet, 60 N. H. 38; Tiernay *v.* McGarity, 14 R. I. 231; Kennedy *v.* Tiernay, 14 R. I. 528; Chase *v.* Duby, 20 R. I. 463; Dolan *v.* Hughes, 20 R. I. 513; Carter *v.* Nichols, 58 Vt. 553; State Bank *v.* Hastings, 15 Wis. 75. As to the validity of assignments of claims against the United States, see Kendall *v.* United States, 7 Wall. 113; Ball *v.* Halsell, 163 U. S. 72; Price *v.* Forrest, 173 U. S. 410; and of claims against municipal corporations, see Delaware County *v.* Diebold Co., 133 U. S. 473, and cases cited.

WELCH *v.* MANDEVILLE

SUPREME COURT OF THE UNITED STATES, FEBRUARY TERM, 1816

[*Reported in* 1 *Wheaton,* 233]

ERROR to the Circuit Court for the District of Columbia for Alexandria County. This was an action of covenant brought in the name of Welch (for the use of Prior) against Mandeville and Jamieson. The suit abated as to Jamieson by a return of no inhabitant. The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this court arises, states, that, on the 5th of July, 1806, James Welch impleaded Mandeville and Jamieson, in the Circuit Court of the District of Columbia, for the county of Alexandria, in an action of covenant, in which suit such proceedings were had, that, afterwards, to wit, at a session of the circuit court, on the 31st day of December, 1807, "the said James Welch came into court and acknowledged that he would not farther prosecute his said suit, and from thence altogether withdraw himself." The plea then avers, that the said James Welch, in the plea mentioned, is the same person in whose name the present suit is brought, and that the said Mandeville and Jamieson, in the former suit, are the same persons who are defendants in this suit, and that the cause of action is the same in both suits. To this plea the plaintiff filed a special replication, protesting that the said James Welch did not come into court and acknowledge that he would not farther prosecute the said suit and from thence altogether withdraw himself; and avers that James Welch, being indebted to Prior, in more than 8,707 dollars and 9 cents, and Mandeville and Jamieson being indebted, by virtue of the covenant in the declaration mentioned, in 8,707 dollars and 9 cents, to Welch, he, Welch, on the 7th of September, 1799, by an equitable assignment, assigned to Prior, for a full and valuable consideration, the said 8,707 dollars and 9 cents, in discharge of the said debt, of which assignment the replication avers Mandeville and Jamieson had notice. The replication farther avers, that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent, or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication farther avers, that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the supposed agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, that the

said James Welch had no authority from Prior to agree or dismiss said suit. The replication farther avers, that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also avers, that the said Prior did not know that the said suit was dismissed until after the adjournment of the court at which it was dismissed; and, farther, that the supposed entry upon the record of the court in said suit, that the plaintiff voluntarily came into court and acknowledged that he would not farther prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covin, collusion, and fraud; and that the said judgment was, and is, fraudulent. To this replication the defendant filed a general demurrer, and the replication was overruled. It appeared by the record of the suit referred to in the plea, that the entry is made in these words: *"This suit is dismissed, agreed,"* and that this entry was made by the clerk without the order of the court, and that there is no judgment of dismissal rendered by the court, but only a judgment refusing to reinstate the cause.

The cause was argued by *Lee,* for the plaintiff, and *Swann,* for the defendant.

STORY, J., delivered the opinion of the court.

The question upon these pleadings comes to this, whether a nominal plaintiff, suing for the benefit of his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covenous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a *retraxit;* and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit (on which we give no opinion), it can be so only when it is *bona fide,* and not for the purpose of defeating the rights of third persons. It would be strange indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the court, that the judgment of the circuit court, overruling the replication to the second plea of the

defendant, is erroneous, and the same is reversed, and the cause remanded for farther proceedings. *Judgment affirmed.*[1]

HORACE S. HOMER *v.* FREDERICK E. SHAW

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 15, 1912–May 24, 1912

[*Reported in* 212 *Massachusetts,* 113]

ONE George A. Lancaster entered into a contract to do a certain portion of the work on a subway for which the defendant was the general contractor. Lancaster began performance of his contract, and being in need of money to pay his workmen obtained from the plaintiff various sums, and as security gave him an assignment of money which might be coming due under Lancaster's contract with the defendant. This assignment was sent to the defendant for acceptance and was accepted by him. Later, on the plaintiff's refusal to advance further sums, Lancaster wrote to the defendant that he was unable to proceed with the contract; but at the defendant's request Lancaster ultimately agreed to go on with the work, on the defendant's agreeing to advance the money necessary to pay for labor and materials used in completing the work, and also to pay Lancaster, personally, $25 a week. This course was pursued and the work completed.

BRALEY, J. The defendant's liability upon acceptance of the assignment depended upon the assignor's performance of his contract

[1] Mandeville *v.* Welch, 5 Wheat. 277, 283; Fassett *v.* Mulock, 5 Col. 466; Chapman *v.* Shattuck, 8 Ill. 49, 52; Marr *v.* Hanna, 7 J. J. Marsh, 642; Hackett *v.* Martin, 8 Me. 77; Matthews *v.* Houghton, 10 Me. 420; Eastman *v.* Wright, 6 Pick. 316. Cutler *v.* Haven, 8 Pick. 490; St. Johns *v.* Charles, 105 Mass. 262; Anderson *v.* Miller, 15 Miss. 586; Lipp *v.* South Omaha Co., 24 Neb. 692; Duncklee *v.* Greenfield Co., 23 N. H. 245; Sloan *v.* Sommers, 2 Green (N. J.), 509; Gaullagher *v.* Caldwell, 22 Pa. 300, 302; Strong *v.* Strong, 2 Aikens, 373. See also Brown *v.* Hartford Ins. Co., 4 Fed. Cas. 379; Wagner *v.* National Ins. Co., 90 Fed. Rep. 395; Chisolm *v.* Newton, 1 Ala. 371; Cunningham *v.* Carpenter, 10 Ala. 109, 112; Reed *v.* Nevins, 38 Me. 193; Rockwood *v.* Brown, 1 Gray, 261.

Defences acquired by the debtor against assignor before notice of the assignment are valid. McCarthy *v.* Mt. Tecarte Co., 110 Cal. 687; Parmly *v.* Buckley, 103 Ill. 115; Barker *v.* Barth, 192 Ill. 460; Brown *v.* Leavitt, 26 Me. 251; Weinwick *v.* Bender, 33 Mo. 80; Washoe County Bank *v.* Campbell, 41 Nev. 153; Ingalls *v.* Burlingame, 71 N. H. 19; Horowitz *v.* David, 145 N. Y. Supp. 998; Rayburn *v.* Hurd, 20 Oreg. 229; Commonwealth *v.* Sides, 176 Pa. 616; Ahrens &c. Co. *v.* Moore, 131 Tenn. 191; Stebbins *v.* Bruce, 80 Va. 389; Dial *v.* Inland Logging Co. 52 Wash. 81.

Defences acquired by the debtor against the assignor after notice of assignment are invalid. Liquidation Est. Co. *v.* Willoughby, [1898] A. C. 321; Nance *v.* Polk (Ark.) 171 S. W. 1195; Kitzinger *v.* Beck, 4 Col. App. 206; Chicago Title Co. *v.* Smith, 158 Ill. 417; Daggett *v.* Flanagan, 78 Ind. 253; McFadden *v.* Wilson, 96 Ind. 253; Milliken *v.* Loring, 37 Me. 408; St. Andrew *v.* Manchaug Mfg. Co., 134 Mass. 42; Schilling *v.* Mullen, 55 Minn. 122; Wells *v.* Edwards Hotel Co. 96 Miss. 191; Leahy *v.* Dugdale, 41 Mo. 517; Cameron *v.* Little, 13 N. H. 23; Andrews *v.* Becker, 1 Johns. 426; Littlefield *v.* Story, 3 Johns. 426; Wilson *v.* Stilwell, 14 Ohio St. 464, 471. Compare Beran *v.* Tradesmen's Nat. Bank, 137 N. Y. 450; First Nat. Bank *v.* Clark, 9 Baxt. 589.

to transport, erect and paint the steel work required for a section of a subway which the defendant was building in accordance with the plans and specifications of the transit commissioners. If not fully performed the entire contract price although payable in monthly instalments never became due, or if before completion the assignor by reason of his inability to go on, voluntarily abandoned the work, he could not recover for work and labor already performed and furnished. Homer *v.* Shaw, 177 Mass. 1. Burke *v.* Coyne, 188 Mass. 401, 404. Buttrick Lumber Co. *v.* Collins, 202 Mass. 413, 420. After the assignor entered upon the performance of the contract he informed the defendant, that owing to the failure of the plaintiff to advance money, which apparently he had agreed to furnish, he would be unable to complete the work as his workmen had not been paid, and if their wages remained in arrears they would leave his employment. The evidence, if no further action had been taken by the parties, and performance of the work had ceased, would have warranted a finding, that, the assignor having repudiated or abandoned his contract before the first instalment of the contract price became payable, the defendant would not have been indebted to the plaintiff. Homer *v.* Shaw, 177 Mass. 1. Bowen *v.* Kimball, 203 Mass. 364, 370, 371. Barrie *v.* Quinby, 206 Mass. 259, 267. But without any ostensible change the assignor remained in charge of the work until completion, and the plaintiff contends under the substituted declaration, that the money thereafter received should be considered as earned under the original contract. The assignor needed immediate financial assistance, and if the defendant might have advanced the money which the evidence shows he furnished to enable him to pay his employees, yet if he had done so the plaintiff's assignment would have been given priority over the loan. Buttrick Lumber Co. *v.* Collins, 202 Mass. 413. The parties while they could not modify to his prejudice the terms of the contract assigned without the plaintiff's consent, or by a secret fraudulent arrangement deprive him of the benefit of the assignment, were not precluded from entering into a new agreement if performance by the assignor had become impossible from unforeseen circumstances. Eaton *v.* Mellus, 7 Gray, 556, 572. Linnehan *v.* Matthews, 149 Mass. 29. It consequently was a question of fact upon all the evidence for the presiding judge before whom the case was tried without a jury, to decide, whether upon facing the exigencies of changed conditions the parties mutually agreed to a cancellation and thereupon in good faith an independent contract was substituted, by the terms of which the defendant undertook to furnish sufficient funds to pay the workmen the wages then due, and their future wages as they accrued, while the assignor was to receive a weekly salary for his personal services of supervision. The refusal to comply with the plaintiff's requests for findings, and the general finding for the defendant manifestly show his conclusion to have been, that the first contract was

treated as having been rescinded, and the plaintiff had no enforceable claim against the defendant under the assignment. Earnshaw *v.* Whittemore, 194 Mass. 187, 192. Glidden *v.* Massachusetts Hospital Life Ins. Co. 187 Mass. 538, 541. The plaintiff's requests for rulings in so far as they were not given were rightly refused, and the exceptions must be overruled.[1] *So ordered.*

EUGENE EMLEY *v.* JAMES H. PERRINE

New Jersey Supreme Court, February Term, 1896

[*Reported in* 58 *New Jersey Law,* 472]

On rule to show cause, &c.

This action is in contract, and the declaration contains only the common counts in *assumpsit.* The bill of particulars declares that the declaration is founded upon the following instrument, viz.:

"March 28, 1888.

"Messrs. Nightengale Bros.:

"I. O. U.

"($250) two hundred and fifty dollars for value received.

"J. H. Perrine,"

assigned by delivery to plaintiff.

One of the pleas was the general issue.

The verdict being for the plaintiff, the defendant obtained this rule to show cause why a new trial should not be granted.

Argued at November Term, 1895, before Beasley, Chief Justice, and Justices Magie and Ludlow.

For the rule, *Clarence Linn.*

The opinion of the court was delivered by

Magie, J. In the course of the trial defendant offered in evidence an assignment for the benefit of creditors, dated December 8th, 1890, and made by the firm of Nightengale Brothers, and by John and Joseph Nightengale, who composed that firm, to John S. Barkalow. The offer was rejected on the ground that a defence of that character should have been interposed by plea or notice.

The rejection of the evidence offered was erroneous.

By section 2 of our "Act respecting assignments for the benefit of creditors" (Gen. Stat. p. 78), such an instrument operates to vest in the assignee all property at its date belonging to the assignors, though not included in the inventory annexed.

When the offer was made, it had appeared in evidence that the instrument upon which plaintiff rested his claim to recover had been made at its date and delivered to John Nightengale, one of the firm of Nightengale Brothers, and had been retained in his possession until November or December, 1893, when it was delivered by him to plaintiff for a consideration.

[1] The statement of facts is abbreviated.

That instrument was non-negotiable and the title which plaintiff acquired by such delivery was not a legal but an equitable title, which, formerly, he could only assert by a suit in the name of the payees of the due bill to his use. 1 Dan. Neg. Inst., § 742. If the present suit is properly prosecuted in his own name, it is by force of the act of March 4th, 1890, amending section 19 of the Practice act. Pamph. L., p. 24; Gen. Stat., p. 269, § 340.

But a transferee of non-negotiable paper by delivery, whether entitled to bring actions thereon in his own name or not, can acquire no better title to the paper than the transferrer had at the time of the delivery. The assignment offered by defendant showed that the holders of this due bill and implied obligation of defendant had, long before its delivery to plaintiff, parted with all their title thereto, and that such title had thereby vested in Barkalow, their assignee.

The evidence of the assignment was clearly relevant and material in respect to the title of the plaintiff to the chose in action on which he sued.

Nor was the defendant debarred from relying upon and proving the lack of title of the plaintiff or his transferrer, because it had not been set up by a plea or notice.

By the English system of pleading and practice a defendant in an action of *assumpsit* could prove, under the plea of the general issue, any matter which showed that plaintiff had never had cause of action. 1 Chit. Pl. 419. Upon that plea, until the adoption of the new rules in the reign of William IV., the question always was whether there was a subsiding debt or cause of action at the commencement of the suit. 1 Tidd. Pr. 592. This was the system adopted in this country. Gould Pl. c. 6, part 1, § 48. In this state the right of defence under the general issue in *assumpsit* had been left unrestrained until the passage of the act which limits such defences to those specified in response to plaintiff's demand. In the case before us no demand seems to have been made.

Defendant was, therefore, in no mode restrained in his defense, and evidence tending to show that plaintiff had no title to the chose in action sued on was competent. The evidence offered would have shown that the transferrer of this chose in action to plaintiff had not at that time any title thereto, and therefore could not and did not confer any title on him.

For the rejection of this evidence the rule to show cause why a new trial should not be allowed must be made absolute.[1]

[1] Burton *v.* Gage, 85 Minn. 355, *acc.* Other authorities are collected in Ames's Cas. on Trusts (2d ed.), 326, *n.*; 1 Williston, Contracts, § 435.

PELLMAN AND ANOTHER *v.* HART, CUMMINGS AND HART

PENNSYLVANIA SUPREME COURT, JULY TERM, 1845

[*Reported in* 1 *Pennsylvania State,* 263]

IN ERROR. The opinion of the court was delivered by ROGERS, J.

The plaintiffs, Hart, Cummings and Hart, having issued an execution on a judgment, rendered in their favor, against Daniel Beckley, attached a note for $311, given by Samuel H. Knight and Elizabeth C. Knight, to the said Daniel Beckley. The garnishees admit the note to be in part justly due, but allege that previously to the attachment, viz., on the 5th September, 1844, Daniel Beckley assigned the note for a valuable consideration to Mary Beckley. The plaintiff replies that the note was not assigned before service of the attachment; that if it were assigned, it was fraudulent; that it was delivered afterwards to Beckley to effect a compromise with his creditors, so that he might not be compelled to take the benefit of the bankrupt law, and that the note was in his possession at the time the attachment was served.

The court put the case on the true point, when they referred it to the jury to say, whether the transfer to Mary Beckley was *bona fide;* and if so, whether Daniel Beckley again became the owner of the note, and was so at the time it was attached. That the note was assigned before the attachment, there was no doubt; and to the points in contest, the jury responded in favor of the defendant; and even if wrong, the error can only be remedied on a motion for a new trial. The only inquiry is, in arriving at this result: Have the court erred in their instruction to the jury?

The plaintiffs, it is contended, have a right of action, because no notice was given of the assignment before the note was attached.

If the debtor had paid the note as in Bury *v.* Hartman, 4 Serg. & Rawle, 177, or had become bound as security of the promisor, as in Frantz *v.* Brown, 17 Serg. & Rawle, 287, it would be a good defence, unless they had notice of the assignment. This rule is intended for the protection of the debtor. So equity will protect the assignee or purchaser for a valuable consideration without notice of the assignment. These are principles which cannot be gainsayed, and are recognized by many cases ruled in this and other courts. But this is not the point here, for immediately on the assignment, as between the assignor, who is the original promisor, to the assignee, and the latter, the equitable title vests in the assignee, which of course cannot be taken to pay the debt of the assignor. All that can be seized in execution, is the right which remains in the assignor; and this is nothing more, where the assignment is made *bona fide,* than the legal title, subject to the equitable interest of the assignee. A general creditor, unless a purchaser without notice, is in no better situation than the debtor, and cannot sell a greater interest than the

debtor has — a principle which applies as well to choses in action, as a note or bond, as to any other chattel. He is not considered in the light of a purchaser without notice, nor has he the right of one. The assignment, as is said in Bury *v.* Hartman, operates as a new contract between the obligor and the assignee, commencing upon notice of the assignment; but this is not at all inconsistent with the principle, that as between the obligor and the assignee the latter acquires such an equity, *eo instanti* the assignment is made, as cannot be defeated by the creditors of the obligor.[1]

Again, it is said, the note was re-delivered to Beckley, and therefore the subject of attachment. It is unquestionably true, that if the note had been re-transferred properly to the original owner, it would be liable to debts of the execution creditor; but when it was delivered for the special purpose, as the jury have found, of effecting a compromise with creditors, which failed, it remains the property of the assignee, and consequently gives no right to the attaching creditor. And to this effect, the court instructed the jury.

It is also contended, that the note was assigned in contemplation of bankruptcy, and therefore void. This is a point not taken in the Court of Common Pleas; yet admitting the point to be as is stated, as between the promissor and the assignee, the title passes. And, although, if the debtor had been prosecuted to bankruptcy, the assignment may have been avoided; yet never having become bankrupt, I do not see what right any one of the creditors has to attach the note in payment of his debts.

Judgment affirmed.

[1] Pickering *v.* Ilfracombe Ry. Co., L. R. 3 C. P. 235; Jones *v.* Lowery, 104 Ala. 252; Walton *v.* Horkan, 112 Ga. 814; Savage *v.* Gregg, 150 Ill. 161; McGuire *v.* Pitts, 42 Ia. 535; Littlefield *v.* Smith, 17 Me. 327; Wakefield *v.* Marvin, 3 Mass. 558; Dix *v.* Cobb, 4 Mass. 512; Thayer *v.* Daniels, 113 Mass. 129; MacDonal *v.* Kneeland, 5 Minn. 352; Schoolfield *v.* Hirsh, 71 Miss. 55; Smith *v.* Sterritt, 24 Mo. 260; Knapp *v.* Standley, 45 Mo. App. 264; Hendrickson *v.* Trenton Bank, 81 Mo. App. 332; Marsh *v.* Garney, 69 N. H. 236; Board *v.* Duparquet, 50 N. J. Eq. 234; Van Buskirk *v.* Warren, 24 Barb. 457; Williams *v.* Ingersoll, 89 N. Y. 508; Meier *v.* Hess, 23 Oreg. 599; Stevens *v.* Stevens, 1 Ashmead, 190; United States *v.* Vaughan, 3 Binn. 394; Speed *v.* May, 17 Pa. 91; Patton *v.* Wilson, 34 Pa. 299; Noble *v.* Thompson Oil Co., 79 Pa. 354, 367; Tiernay *v.* McGarity, 14 R. I. 231; Brown *v.* Minis, 1 McCord, 80; Ballingham Co. *v.* Brisbois, 14 Wash. 173, *acc.*; Bishop *v.* Holcomb, 10 Conn. 444; Vanbuskirk *v.* Hartford Ins. Co., 14 Conn. 141; (*conf.* Clark *v.* Connecticut Peat Co., 35 Conn. 303); Clodfelter *v.* Cox, 1 Sneed, 330; Dews *v.* Olwill, 3 Baxt. 432; Rhodes *v.* Haynes, 95 Tenn. 673; Ward *v.* Morrison, 25 Vt. 593; Nichols *v.* Hooper, 61 Vt. 295, *contra*. See also McWilliams *v.* Webb, 32 Ia. 577; Ruthven *v.* Clarke, 109 Ia. 25; Whiteside *v.* Tall, 88 Mo. App. 186, 171; 1 Williston, Contracts, § 434.

AMERICAN LITHOGRAPH COMPANY *v.* CHARLES S. ZIEGLER AND OTHERS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, November 11, 12, 1913–January 8, 1914

[*Reported in* 216 *Massachusetts,* 287]

LORING, J. This is an action upon a written contract by which the defendants, doing business under the name of the Chester Suspender Company, agreed to pay one Klausner $600 for a two-page advertisement of Chester suspenders, in a new magazine which Klausner was then proposing to publish. The contract sued on was dated October 8, 1909, and on October 30, 1909, Klausner executed and delivered to the plaintiff an assignment of it in these words: "In consideration of One Dollar, the receipt of which is hereby acknowledged, I hereby sell, assign and transfer, unto American Lithographic Company, all my right, title and interest in and to this contract, and all benefits to accrue thereon." On the same day (October 30, 1909) Klausner notified the defendants that he had assigned "your order" to the plaintiff, who would "render bill." When the stipulated publication had been made, the plaintiff sent the defendants a bill which they refused to pay on the ground that the magazine published was not what Klausner agreed that it should be.

At the trial the defendants also set up the defense that the work of getting up and publishing the proposed new magazine was a personal undertaking to be performed by Klausner, and so not a contract which could be assigned before performance; that the assignment made was an assignment of the right to perform the contract as well as an assignment of the amount due when the contract had been performed, and so was invalid.

But there was no evidence that the plaintiff undertook to act upon that part of the assignment which entitled it to publish the proposed magazine. The evidence was uncontradicted that this was done by Klausner. One of the defendants testified that they knew of the proposed assignment to the plaintiff, and that they understood "that it was a sort of security so that they [the plaintiff] would get their money for it [the printing]."

In this state of the evidence the presiding judge[1] instructed the jury "that that assignment was an assignment that could be made by Klausner to the Lithograph Company. It was for the purpose, as the papers in the case show — and it is not in dispute — of securing the Lithograph Company for the expense of printing. Now you will treat this case just the same as if Klausner was suing the partnership consisting of the two Zieglers and Van der Pyl . . . ;

[1] Aiken, C. J.

so I repeat, you will try this case just the same as if Klausner were suing the Chester Suspender Company, which consists of the three men who appeared here on the stand."

Had there been any evidence that the plaintiff had undertaken under this assignment to do the work which Klausner was to do under the original contract with the defendants, this instruction would have been wrong. But there was no such evidence in the case. The plaintiff and Klausner never had acted under that clause in the assignment; they had acted under the other clause by which Klausner assigned to the plaintiff "all benefits to accrue [to him] thereon."

To find for the plaintiff as they did the jury under this charge had to find that Klausner had performed his contract with the defendants. In other words, the jury had to find that those things had taken place which the defendants contended ought to have taken place to make them liable under the contract to some one. The defense now insisted on is purely technical. It is this: That although the assignment contained a clause which carried to the plaintiff as assignee the money due under their contract with Klausner, it (the assignment) contained another clause which undertook to give the plaintiff a right to do what Klausner was to do under the original contract, and that that clause is void. Their contention is that the existence of this void clause in the assignment, although never acted upon by the parties to it, renders the other clause of the assignment void. We are of opinion that the contention is not sound.

The right of the plaintiff to bring this action as assignee in its own name depends upon the law of the forum. See, for example, Leach *v.* Greene, 116 Mass. 534. The first ruling asked for was rightly refused.[1] The view which we have taken of the case renders the other rulings immaterial. We have found nothing in the cases cited by the defendants which requires notice.

We are of opinion that a written assignment of money to be due under a contract made before performance is within R. L. c. 173, § 4.

Exceptions overruled.

[1] The first ruling asked for was as follows: "1. The construction, validity and effectiveness of the assignment from Klausner to the plaintiff are to be determined by the law of the State of New York."

JOSEPH M. HERMAN *v.* CONNECTICUT MUTUAL LIFE INSURANCE COMPANY AND OTHERS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 23, 1914–May 25, 1914

[*Reported in* 218 *Massachusetts,* 181]

BILL IN EQUITY, filed in the Superior Court on September 15, 1913, and afterwards amended, in which as amended the Connecticut Mutual Life Insurance Company, Harry R. Stanley, executor of the will of Sumner C. Stanley, and Bernhard Sommer were named defendants, and which contained the following allegations in substance:

In 1896 Sommer procured an ordinary policy of life insurance from the defendant company in the sum of $10,000, payable in case of his death to his heirs, executors and assigns. At the date of the bill the policy had a cash surrender value of $4,000. On February 11, 1909, for a valuable consideration Sommer assigned his interest in the policy to the plaintiff as collateral security for the indebtedness of Sommer to the plaintiff and others described in the instrument of assignment. One George E. Williams, who at the time of that assignment and until his death on July 28, 1913, was the general agent of the insurance company in Boston, drew the assignment and Sommer delivered it and the policy to Williams to be turned over to the plaintiff. Williams delivered the assignment to the plaintiff but did not deliver the policy, falsely asserting that the company held it as collateral security for premium notes payable to it. The company did not hold the policy and Sommer was in no way indebted to it. Williams held the policy and on February 2, 1910, delivered it with what purported to be an assignment of Sommer's interest therein to the defendant Stanley, and Stanley claimed to hold it as security for a loan of $4,000, refusing to deliver it to the plaintiff when he demanded it and secreting it so that it could not be reached by the plaintiff in an action of replevin. The plaintiff denied the validity of the assignment to Stanley. The company refused to recognize the plaintiff's rights to the policy, alleging that it was unable to determine who owned it. A quarter annual premium on the policy was overdue and there was danger that the policy would lapse for non-payment of premiums.

The policy provided that no assignment should be valid unless made in writing and a duplicate or certified copy filed with the Company. Both assignees acted in good faith. Williams died on August 1, 1913. The plaintiff notified the Insurance Company on October 5th, 1913, of the assignment of the policy to him. Stanley notified the Insurance Company on August 23, 1913, of the assignment of the policy to him. Each assignee was ignorant of the assignment to the other, until after the death of Williams.

SHELDON, J. 2. The plaintiff by his assignment from Sommer acquired as against the latter a valid title to the policy of insurance which here is in question. As between the plaintiff and Sommer, it is immaterial that the assignment was not written upon or attached to the policy, that no reference to the assignment was written or noted on the policy, or that no notice of it was given to the insurance company, either in the manner required by the fifth clause of the policy or otherwise. Merrill *v.* New England Mutual Life Ins. Co. 103 Mass. 245, 252. Hewins *v.* Baker, 161 Mass. 320. Atlantic Mutual Life Ins. Co. *v.* Gannon, 179 Mass. 291. See also Northwestern Mutual Life Ins. Co. *v.* Wright, 153 Wis. 252; Wood *v.* Phœnix Mutual Life Ins. Co. 22 La. Ann. 617; Manhattan Life Ins. Co. *v.* Cohen, 139 So. W. Rep. 51; Howe *v.* Hagan, 97 N. Y. Supp. 86; Cowdrey *v.* Vandenburgh, 101 U. S. 572; Dunlevy *v.* New York Life Ins Co. 204 Fed. Rep. 670; Fortescue *v.* Barnett, 3 M. & K. 36. The contrary statements in Palmer *v.* Merrill, 6 Cush. 282, have not been followed. James *v.* Newton, 142 Mass. 366, 378. Richardson *v.* White, 167 Mass. 58, 60. The English rule, as stated in Dearle *v.* Hall, 3 Russ. 1, though adopted in many other jurisdictions, is not the law of this Commonwealth. Thayer *v.* Daniels, 113 Mass. 129, 131. Putnam *v.* Story, 132 Mass. 205, 211.

It is true also, as the plaintiff has contended, that the owner of a chattel does not, by merely entrusting to the third person the custody or even the possession thereof, hold him out as its owner, and will not by that fact alone be estopped from setting up his title against even a *bona fide* purchaser from his bailee. Rogers *v.* Dutton, 182 Mass. 187, 189, and cases there cited. But we have here to do, not with a chattel, but with a non-negotiable chose in action, the right to receive in the future a certain sum of money upon the happening of certain contingencies. The policy of insurance merely shows the existence, nature and extent of the right. As has been correctly stated by counsel for Stanley, "it is the tangible evidence which the owner of the right possesses in order to show title to the right." The court must apply here the rule stated by the Chief Justice in Baker *v.* Davie, 211 Mass. 429, 440, "that when an owner has so acted as to mislead a third person into the honest belief that the one dealing with the property had a right to do so, he is estopped from showing the truth." The statement of Lord Herschell in London Joint Stock Bank *v.* Simmons, [1892] A. C. 201, 215, quoted and followed by this court in Gardner *v.* Beacon Trust Co. 190 Mass. 27, 28, is to the same effect: "The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can

show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner." The same general principle (although its application in that case depended upon the existence of a custom) was stated again in Baker *v.* Davie, 211 Mass. 429, 436. See also Washington *v.* First National Bank, 147 Mich. 571; Brocklesby *v.* Temperance Permanent Building Society, [1895] A. C. 173, 181; Farquharson Brothers & Co. *v.* King & Co. [1901] 2 K. B. 697. See Scollans *v.* Rollins, 173 Mass. 275.

But this estoppel of a rightful owner to set up his title against a *bona fide* purchaser for value from one who had not the right to sell rests upon the conduct of the rightful owner. It arises against him when by his own conduct he has so clothed the wrongdoer with the *indicia* of ownership as to justify third persons in regarding the wrongdoer as either the rightful owner or as having authority from that owner. The estoppel arises only from the owner's voluntary action tending to produce and in fact producing that result. If this policy had been delivered to the plaintiff and then had been obtained from him by Sommer or Williams by means of a common law larceny, there would have been no foundation for an estoppel against the plaintiff, because, whatever third persons might have thought or even might have been justified in thinking, the possession and apparent ownership would not have been put into Sommer or into Williams as Sommer's agent by any voluntary action of the plaintiff. Bangor Electric Light & Power Co. *v.* Robinson, 52 Fed. Rep. 520. Farmers' Bank *v.* Diebold Safe & Lock Co. 66 Ohio St. 367. This distinction was stated clearly by Holmes, C. J. in Russell *v.* American Bell Telephone Co. 180 Mass. 467, 469, *et seq.,* citing as typical cases Knox *v.* Eden Musee American Co. 148 N. Y. 441, and Pennsylvania Railroad's appeal, 86 Penn. St. 80. See also Varney *v.* Curtis, 213 Mass. 309, 312.

The rights of these parties depend upon the application of the principles which we have stated.

The plaintiff took his assignment by an instrument separate and apart from the policy itself. He allowed the possession of the policy to remain unaltered. It is true that he did this on the false representation that it was held by the insurance company as security for a premium loan; but the fact remains that it was his voluntary act. He took no other precaution, either by giving notice to the company or otherwise. He testified that he did not even tell Sommer that the policy had not been delivered to him. He trusted everything to Williams; and his own testimony was that he did this by reason of his "full confidence in Williams." He knowingly allowed the circumstances to be such as to indicate that Sommer retained the full ownership of the policy, and such that no inquiry of the company would disclose anything to the contrary or throw any doubt

upon Sommer's title. For this reason, such cases as Mente *v.* Townsend, 68 Ark. 391, are not applicable here. The case is a stronger one than Bridge *v.* Connecticut Mutual Life Ins. Co. 152 Mass. 343, and the reasoning of that opinion is decisive against the plaintiff. There are no circumstances upon which any distinction can be made in his favor.[1]

OAK GROVE CONSTRUCTION COMPANY *v.* JEFFERSON COUNTY

CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, February 2, 1915

[*Reported in* 219 *Federal Reporter,* 858]

DENNISON, Circuit Judge. The county of Jefferson, in 1906, after due preliminaries, let a road construction and improvement contract to five men associated as a partnership as "Oak Grove Construction Company." Very soon afterwards, and before much construction work was done, these associates organized an Alabama corporation, named "The Oak Grove Construction Company" (the plaintiff), and assigned to it their contract. The work was continued by plaintiff about three years, and the county paid plaintiff, on estimates, from time to time, the greater part of the expense of the work. At the end, plaintiff brought this suit to recover a balance of several thousand dollars, all made up of disputed items, and all having accrued on account of its materials furnished and work done long after the assignment. Under these circumstances, it is said that the trial court had no jurisdiction, because the suit was brought upon an assigned contract, and the assignors were citizens of the same state with defendant.

[1] The provision of Section 1 of the Act of 1887 as amended by Act of Aug. 13, 1888 (25 Stat. 433) to the effect that the federal courts shall not entertain a suit to recover the contents of any chose in action in favor of any assignee, unless the same suit might have been there brought by the assignor does not, in our judgment, apply to this case. The ambiguity inherent in the phrase "recover the contents of a chose in action" has been cleared by deciding that the prohibition is one against suit upon an assigned right of action. Shoecraft *v.* Bloxham, 124 U. S. 730, 735, 8 Sup. Ct. 686, 31 L. Ed. 574; Kolze *v.* Hoadley, 200 U. S. 76, 82, 26 Sup. Ct. 220, 50 L. Ed. 377. And see Brown *v.* Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 58 L. Ed. — (Jan. 5, 1915). Since in this case the court below directed a verdict for the county, we must assume, for the purposes of this review, whatever facts plaintiff's testimony tended to show. From this point of view, it is clear that the suit is not brought upon an assigned right of action. The assignors never had any

[1] The statement of facts is abbreviated and a portion of the opinion omitted.

right to bring a suit to recover either the agreed price or the reasonable value of the materials furnished and work done by plaintiff. The right of action originally accrued to the plaintiff, it never existed until plaintiff parted with these considerations, and thereupon it vested in plaintiff and vested nowhere else. As was said in Paige *v.* Rochester (C. C.) 137 Fed. 663, 665, plaintiff's "cause of action does not depend upon the assignment of a chose in action to him, but upon the assignment of a right to him by which, by performance, he acquired a chose in action to himself."

There is no substantial distinction between the present case and American Co. *v.* Continental Co., 188 U. S. 104, 23 Sup. Ct. 265, 47 L. Ed. 404, in which an assignee of a contract sued the other original party with reference to a breach which occurred after the contract had been assigned, and such a suit was held not within the prohibition. True, there had been, in that case, a greater degree of substitution and release of the assignor than our subsequent discussion herein of the subject of novation indicates to be essential to the maintenance of this action; but the opinion of the Supreme Court expressly denies the importance of substitution. The result is placed upon the arising of a new contract between defendant and assignee. The same character of new contract is alleged and (by tendency) proved here — the kind which comes from the transfer of an assignable contract and subsequent continuing performance by the assignee, and the other party's acceptance and recognition of the assignee as one entitled to perform and to receive performance. The present case is also well within the principle of Superior City *v.* Ripley, 138 U. S. 93, 96, 97, 11 Sup. Ct. 288, 34 L. Ed. 914, which has been applied to circumstances analogous to those here involved (Seymour *v.* Farmers' Co. [C. C. A. 7] 128 Fed. 907, 63 C. C. A. 633) as well as to the converse situation (Eau Claire *v.* Payson [C. C. A. 7] 109 Fed. 676, 48 C. C. A. 608).

Plant Co. *v.* Jacksonville Co., 152 U. S. 71, 72, 14 Sup. Ct. 483, 38 L. Ed. 358, is not inconsistent with the view we adopt. A railroad company, being by contract entitled to a specific consideration for constructing its road, employed the Plant Company to build the railroad, and the Plant Company did this work for the railroad. Then the railroad assigned to the Plant Company the railroad's right to recover the consideration, and it was held that the situation was governed by the prohibition against suits by an assignee; but the distinction between that case and this is obvious. To make the cases parallel, it would have to be supposed that in this case the partnership employed the corporation to do the construction work as the agent of the partnership, and that theory is urged by defendant as a proper inference from the facts; but it is not the theory upon which this review must depend. Plaintiff's testimony tended to show the other theory which we have stated.

Corbin *v.* Black Hawk, 105 U. S. 659, 26 L. Ed. 1136, is also

clearly distinguishable. That suit was to enforce specific performance of a promise made to plaintiff's assignor, the contract was still executory on both sides, and an inseparable part of the right sued for had fully accrued before the assignment, and passed thereby. We conclude that neither upon the demurrer nor upon the motion to instruct was the defendant entitled to prevail on the jurisdictional question.

[2] The trial court put its final action upon the ground that a novation as between the first parties and the later parties was necessary, and that this did not sufficiently appear. If by novation is meant complete substitution, whereby the corporation took for all purposes the place of the partnership and the partnership was released from all liability under the contract, we agree with the trial court that this did not appear. The law requires the county to take a bond from the contractors. This was done when the contract was let to the partnership; but no such bond was required of the corporation, nor was its propriety suggested. This circumstance alone — although it is aided by others — makes clear that there could have been no purpose to release the partnership from its liability, and to accept, in substitution, the promise of the corporation.

This conclusion of fact causes the record to present the question whether, lacking such novation, plaintiff may nevertheless recover; and the nature of the real inquiry here is shown by reciting the situation. There is no attempt to compel the county to perform an executory contract, nor to accept continuing performance from an unsatisfactory assignee. It is not asked to assume any continuing relations with an assignee. Whether the assignors were released from their obligations is not practically important, because those obligations have been fully met, and the county, with all due formality, has accepted the work and acknowledged complete performance of the contract.[1] No resort to the contract terms is now proposed, save as a measure of compensation for some of the work. No claim under the contract is made by the assignors, and no double liability against the county is suggested. The county, with knowledge of the assignment, saw the assignee performing for three years, accepted performance, made partial payments to the assignee, fully accepted the whole work, but refuses to pay the balance due. Such a refusal must be supported by some imperative rule of law, before it can be justified.[2]

[1] The proofs tended to show that the commissioners for the county actually went over the improvements with plaintiff's representatives, and actively recognized the carrying on and completion of the contract by plaintiff.

[2] A portion only of the opinion is printed.

THE BRITISH WAGGON COMPANY AND THE PARKGATE WAGGON COMPANY *v.* LEA AND COMPANY

In the Queen's Bench Division, January 13, 1880

[*Reported in* 5 *Queen's Bench Division,* 149]

The judgment of the court (Cockburn, C. J., and Manisty, J.) was delivered by —

Cockburn, C. J. This was an action brought by the plaintiffs to recover rent for the hire of certain railway waggons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances: —

By an agreement in writing of Feb. 10, 1874, the Parkgate Waggon Company let to the defendants, who are coal merchants, fifty railway waggons for a term of seven years, at a yearly rent of £600 a year, payable by equal quarterly payments. By a second agreement of June 13, 1874, the company in like manner let to the defendants fifty other waggons, at a yearly rent of £625, payable quarterly like the former.

Each of these agreements contained the following clause: "The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said waggons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the waggons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On Oct. 24, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed, and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding up of the company should be continued under the supervision of the court.

By an indenture of April 1, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendants, together with the benefit of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand, covenanting with the Parkgate Company "to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof, were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British

Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the wagons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs. It is expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said waggons. This, however, they have done under a special agreement come to between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation, secondly, by assigning the contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this court, the use of the waggons by the defendants being in the meanwhile continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding up, the company is by the effect of ss. 95 and 131 kept alive, the liquidator having power to carry on the business, "so far as may be necessary for the beneficial winding up of the company," which the continued letting of these waggons, and the receipt of the rent payable in respect of them, would, we presume, be.

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfill their obligation to keep the wagons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of Robson *v.* Drummond, 2 B. & Ad. 303, approved of by this court in Humble *v.* Hunter, 12 Q. B. 310. In Robson *v.*

Drummond, 2 B. & Ad. 303, a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker — Robson being then a partner in the business, but unknown to the defendant — on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held that the defendant could not be sued on the contract, — by Lord Tenterden, on the ground that "the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;" and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this Boulton *v.* Jones, 2 H. & N. 564, is a sufficient authority. The case of Robson *v.* Drummond, 2 B. & Ad. 303, comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in Robson *v.* Drummond, 2 B. & Ad. 303, rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company — a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute — the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the waggons should be kept in repair; it was indifferent to

them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in Robson *v.* Drummond, 2 B. & Ad. 303, went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim *Qui facit per alium facit per se* applies.

In the view we take of the case, therefore, the repair of the waggons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in Brice *v.* Banister, 3 Q. B. D. 569, be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.[1]

[1] In American Smelting & Refining Company *v.* Bunker Hill & Sullivan Mining Company & Concentrating Company, 248 Federal Reporter 172, 186, the court said:

"The assignment, it must be understood, cannot relieve the assignor of its obligations to the Mining Company under its agreement, 5 C. J. 879. But the Smelting Company having by the assignment delegated its performance to the A. S. & R. Company, and the A. S. & R. Company by accepting the assignment having become bound to perform as the Smelting Company was bound in the first instance, the Mining Company has lost no remedial rights, but instead has been accorded a like remedy against the A. S. & R. Company to that it had against the Smelting Company." See also Rochester Lantern Co. *v.* The Stiles and Parker Press Co. 135 N. Y. 209.

KEMP and Others *v.* BAERSELMAN

In the Court of Appeal, July 7, 1906

[*Reported in* [1906] 2 *King's Bench,* 604]

The plaintiff George H. Kemp was previously to the assignment hereinafter mentioned a cake manufacturer, carrying on business at two places in London (Annette Road, Holloway, and Martineau Road), and having a depot at Cardiff. The defendant was a provision merchant. By an agreement dated March 24, 1904, made between G. H. Kemp and the defendant it was agreed as follows: —

1. "Baerselman agrees to supply and Kemp agrees to accept all the fresh shell eggs Star Wreaths or equal to Star Wreaths that he shall require for manufacturing purposes for one year from April 1, 1904, to April 1, 1905," at certain specified prices.

3. "The said Baerselman agrees to deliver all shell eggs . . . to either of Kemp's London factories free of charge and all goods for Kemp's Cardiff depot free on rail or boat."

4. "Every 14 days a statement of account is to be rendered and after being checked and found correct Baerselman to draw for the amount at two months from the date of delivery."

5. "During the continuance of this agreement or so long as the said Baerselman shall continue to supply sound fresh eggs satisfactorily to the said Kemp the said Kemp undertakes not to purchase eggs from any other merchant."

In July, 1904, G. H. Kemp purchased the business of a company called the National Bakery Company, carrying on business at Brewery Road, London, N., and at the same time transferred the said business, together with his business at Annette Road and at Cardiff, to a new company called George Kemp, Limited, the business at Martineau Road being abandoned.

By the terms of the amalgamation of the said businesses the shareholders in the National Bakery Company received as the purchase-money of their business, 29,000*l.* of debentures in George Kemp, Limited; and the whole of the ordinary share capital of George Kemp, Limited, consisting of 20,000 shares of 1*l.* each, was, with the exception of seven shares, taken by G. H. Kemp, who acted as the manager of the amalgamated businesses.

On September 17th, ten days after receiving notice of the amalgamation, the defendant wrote refusing to supply any more eggs under the agreement. Thereupon G. H. Kemp and George Kemp, Limited, joined in bringing this action, which was tried before Channell, J., without a jury. He held that the plaintiffs were entitled to recover damages suffered due to the refusal to deliver eggs at Annette Road and at Cardiff depot; but not for the refusal to deliver at Brewery Road. Both parties appealed.

Lord Alverstone, C. J. With regard to the subject of the plaintiff's cross appeal I think that Channell J., was clearly right, and that even if the benefit of the contract was assignable so far as it related to the supply of eggs to the business carried on by G. H. Kemp, still the plaintiffs could not in any event claim to have a supply for the Brewery Road business, for Kemp never carried on business there, and consequently never had any requirements for that business. But, with regard to the defendant's appeal, I regret to have to differ from Channell J., and the reasons why I differ from him are these: he seemed to be of opinion that, because this was a contract for the supply of an ordinary marketable commodity like eggs, the benefit of the contract could be assigned, and that it made no difference to the defendant who the persons were to whom the eggs were to be supplied by him. He did not anywhere in his judgment deal with clause 5 — the clause whereby the purchaser bound himself not to buy eggs from any other persons, and did not sufficiently consider the personal element which that clause introduced. I can find nothing in the judgments in Tolhurst's Case[1] in the House of Lords which can be interpreted as laying down the general principle for which Mr. Hamilton contended, namely, that the benefit of any contract of this kind can be assigned. What the House of Lords did say in that case was that in that particular case the contract for the supply of chalk for fifty years was to be treated as a contract for the supply to a given cement-making place, and not a personal contract. But there is nothing that I can see in the present contract which enables me to say that it is a contract to supply eggs to a particular place. The first clause provides that Baerselman shall supply, and Kemp shall accept, all the fresh eggs that he, Kemp, shall require for manufacturing purposes for one year. Then by clause 5 Kemp undertakes not to purchase eggs from any other merchant. That, as I have said, imposes a personal obligation upon the purchaser which may be very material to the contract. It is not seriously contended that Kemp, Limited, or any other assignee would be bound by that obligation unless there was something amounting to a novation; and here was no evidence of a novation. I think this contract was not one the benefit of which can be assigned simply by a sale of the business, and that when the facts which were proved had become known to Baerselman he was entitled to refuse to continue the supply. I am not altogether satisfied that there is not also an argument in support of the defendant's contention to be based on the terms of payment, though I do not attach so much importance to it, because it may be that, when the authorities come to be examined, it will be found that the Courts have treated the question of payment as one which does not prevent the benefit of a contract from being assignable. I only mention it so that in the event of the case going further it may not be thought that it has been overlooked. I base my decision on the ground that

[1] [1903] A. C. 414.

clauses 1 and 5 shew that the contract was a personal one, the measure of the defendant's obligations as to supply being the extent of Kemp's personal requirements, and the undertaking by Kemp not to buy eggs of other merchants being an undertaking which was purely personal to himself. The defendant's appeal therefore must be allowed.[1]

EDWARD B. JAMES *v.* CITY OF NEWTON AND ANOTHER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, Jan. 25–Sept. 7, 1886

[*Reported in* 142 *Massachusetts,* 366]

THIS was a bill in equity brought by the plaintiff against the City of Newton and Royal Gilkey, assignee in insolvency of the estate of William H. Stewart, to enforce payment of $600, which had been assigned to the plaintiff by Stewart out of money reserved as a guaranty by the City of Newton for the proper performance of a contract by Stewart to build a schoolhouse. The City of Newton in its answer admitted that it had in its hands over $600, due on account of this contract, and stated that it was "willing to pay said balance to such person or persons as should be justly entitled to receive the same." The defendant Gilkey in his answer claimed that the assignment was invalid.[2]

C. C. Powers, for the plaintiff.

W. S. Slocum, for the City of Newton.

W. B. Durant, for Gilkey.

FIELD, J. The assignment in this case is a formal assignment, for value, of "the sum of six hundred dollars now due and to become due and payable to me" from the City of Newton, under and by virtue of a contract for building a grammar schoolhouse, and it is agreed that this sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same." There is no doubt that it would operate as an assignment to the extent of $600, if there can be assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto,* unless it is accepted by the person on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment, except against the assignor if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the City

[1] The statement of facts is abbreviated and concurring opinions by Sir Gorell Barnes, President, and Farwell, L. J. are omitted.

[2] The statement of facts has been much abbreviated.

of Newton has not promised him that it will pay him $600. The $600 is expressly made payable "out of the money reserved as a guaranty by said city;" and, by the contract, the balance reserved was payable as one entire sum; and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to an assignee of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but for a long time they have recognized and enforced assignments of the whole of a debt, by permitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is not wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor cannot sue his debtor for a part of an entire debt, and, if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. Warren *v.* Comings, 6 Cush. 103.

It is said that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that, as between assignor and assignee, there may be such an assignment. The law that, if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee, and that by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held, by courts of equity which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debter, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid to the different defendants according to their rights as between themselves; and the rule against partial assignments was established for the benefit of the debtor. Public Schools *v.* Heath, 2 McCarter, 22; Fourth National Bank *v.* Noonan, 14 Mo. App. 243.

In many jurisdictions courts of equity have gone farther, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure

in equity is adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone still farther, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that is no defence to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he cannot, if he have notice or knowledge of an assignment of any part of it.

It may be argued that, if a bill in equity can be maintained against the debtor by an assignee of a part of the debt, it must be on the ground, not only that the plaintiff has a right of property in the sum assigned, but also that it is the debtor's duty to pay the sum assigned to the assignee; and that, if this is so, it follows that, after notice of the assignment, the debtor cannot rightfully pay the sum assigned to the assignor.

The facts of this case, however, do not require us to decide whether a bill can be maintained after the debtor has paid the entire debt to his creditor, although after notice of a partial assignment. The City of Newton, in its answer, says that it "is willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff, or said Gilkey as such assignee;" and prays "that said plaintiff and said Gilkey may interplead, and settle and adjust their demands between themselves, and that the court shall order and decree to whom said sum shall be paid." This is in effect asking the aid of the court in much the same manner as if the City of Newton had brought a bill of interpleader; and the proceedings are not open to the objection that the court is compelling the City of Newton to assent to an assignment against its will.

This is the first bill in equity to enforce a partial assignment of a debt which has been before this court. It has been often declared here that there cannot be an assignment of a part of an entire debt without the assent of the debtor; but the cases are all actions at law, and in the majority of them the statement was not necessary to the decision.

In Tripp *v.* Brownell, 12 Cush. 376, 381, the action was assumpsit, to recover the amount of the plaintiff's lay as a mariner on a whaling voyage. The defence was an assignment of the balance due, made by the plaintiff and accepted by the defendant. This was held a good defence, the court saying: "It is in terms an assignment of the whole lay; it must be so by operation of law. It is not competent for a creditor to assign part of the debt, so as to give any equitable in-

terest in part of the debt, or create any lien upon it. The debtor, or holder of the assignable interest, cannot, without his own consent, be held legally or equitably liable to an assignee for part, and to the original creditor, or another assignee for another part. Mandeville *v.* Welch, 5 Wheat. 277; Gibson *v.* Cooke, 20 Pick. 15; Robbins *v.* Bacon, 3 Greenl. 346."

Gibson *v.* Cooke, *ubi supra,* was assumpsit, brought in the name of Gorham Gibson for the benefit of one Plympton, to whom Gibson had given an order on the defendant to pay Plympton $175.33 "as my income becomes due." The defendant held property in trust to pay over the "net proceeds once a quarter" to Gibson and others. The court held that it did not appear that, "at the time of the assignment, or at any period since, the whole amount due to Gorham Gibson would correspond with the amount of the draft," and that "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire."

Knowlton *v.* Cooley, 102 Mass. 233, was a trustee process, and the trustee had in his hands $147 due the defendant as wages, and the claimant held an order, given by the defendant before the wages were earned, for the payment to him of the defendant's wages, "as fast as they became due, to the amount of $150," which the trustee had accepted. The court held that the order was an assignment of wages, and not having been recorded, was invalid against a trustee process by the St. of 1865, c. 43, s. 2. The court say: "The acceptance of the order by Barton [the trustee] does not change its character. His assent was necessary to give it any validity even as an assignment. Gibson *v.* Cooke, 20 Pick. 15."

Papineau *v.* Naumkeag Steam Cotton Co., 126 Mass. 372, was an action of contract, and the court say: "The order of Couillard on the defendant, in favor of the plaintiff, was not an order for payment of all that should be due the drawer as wages at the several times when the instalments were to be paid. It was not, therefore, an assignment of wages to the plaintiff, unless the defendant saw fit to assent to it as such, but a mere order for money."

It is settled that an assignment of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good against a trustee process, or against an assignee in insolvency. Taylor *v.* Lynch, 5 Gray, 49; Lannan *v.* Smith, 7 Gray, 150. In Bourne *v.* Cabot, 3 Met. 305, the court say, "The order of Litchfield on the defendant was a good assignment of the fund, *pro tanto,* to the plaintiff, and the express promise to the assignee, to pay him the balance when the vessel should be sold, constituted a legal contract."

It is also settled that an equitable assignment of the whole fund in the hands of the trustee is good against a trustee process, although

the trustee has received no notice of the assignment until after the trustee process is served, and has never assented to it. Wakefield *v.* Martin, 3 Mass. 558; Kingman *v.* Perkins, 105 Mass. 111; Norton *v.* Piscataqua Ins. Co., 111 Mass. 532; Taft *v.* Bowker, 132 Mass. 277; Williams *v.* Ingersoll, 89 N. Y. 508.

Before, as well as since, the St. of 1865, c. 43, s. 1 (Pub. Sts. c. 183, s. 38), if the assignment was for collateral security, and the assignee was bound to pay immediately to the assignor, out of the sum assigned, any balance remaining after payment of his debt, it has been held that the excess above the debt for which the assignment is security is attachable by the trustee process. Macomber *v.* Doane, 2 Allen, 541; Darling *v.* Andrews, 9 Allen, 106; Warren *v.* Sullivan, 123 Mass. 283; Giles *v.* Ash, 123 Mass. 353. See Lannan *v.* Smith, *ubi supra.*

In Macomber *v.* Doane, *ubi supra,* the court say: "An order constitutes a good form of assignment, it being for the whole sum due or becoming due to the drawer, and it needs not be accepted to make it an assignment." The order was for one month's wages, which, as subsequently ascertained, amounted to $37.50, but it was given as security for groceries furnished and to be furnished, and, on the day of the service of the writ, the defendant owed the plaintiff for groceries $28.79, and the remaining $8.71 was held by the trustee process.

Some of these cases were noticed in Whitney *v.* Eliot National Bank, 137 Mass. 351, and the court then declined to decide "whether in equity there may not be an assignment of a part of a debt."

Without considering the cases upon the effect of orders or drafts for money, as constituting assignments of the debt or of a part of it, it seems never to have been decided in this Commonwealth that an assignment for value of a part of an entire debt is not good, to the extent of the assignment, against trustee process. In trustee process, the trustee of the defendant, if charged, is by the statute compelled to pay to the plaintiff so much of what he admits to be due to the defendant as is necessary to satisfy the plaintiff's judgment; and, as an entire debt may thus be divided, it seems equitable that an assignee of a part of the debt should be admitted as a claimant, and this is in effect done when the assignment is as collateral security.

Palmer *v.* Merrill, 6 Cush. 282, was assumpsit against the administrator of Spaulding, who had caused his life to be insured by a policy payable to himself, his executors, administrators, or assigns; and he, by a memorandum in writing indorsed on the policy, for a valuable consideration, assigned and requested the insurer to pay the plaintiff the sum of $400, part of the sum insured by the policy, in case of loss on the same, of which assignment and request the insurers on the same day had due notice. The policy, with this indorsement thereon, remained in the custody of Spaulding until

his decease, and came into the hands of the administrator of his estate, who collected the whole amount of the insurance, and represented the estate as insolvent; and the question was "whether the case shows an assignment which vested any interest in this policy, legal or equitable, in the plaintiff."

The court held that it did not, and said: "According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But in order to constitute such an assignment two things must concur: first, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee or to some person for his use, the security, if there be one, bond, deed, note or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the chose in action consists. . . . It appears to us that the order indorsed on this policy and retained by the assured fails of amounting to an assignment in both of these particulars." The court further said that, if an order be "for a part only of the fund or debt, it is a draft or bill of exchange, which does not bind the drawee, or transfer any proprietary or equitable interest in the fund, until accepted by the drawee. It therefore creates no lien upon the fund. Upon this point the authorities seem decisive. Welch *v.* Mandeville, 1 Wheat. 233, s. c. 5 ib. 277; Robbins *v.* Bacon, 3 Greenl. 346; Gibson *v.* Cooke, 20 Pick. 15."

Welch *v.* Mandeville, *ubi supra,* was an action of covenant broken, brought by Prior in the name of Welch against Mandeville, who set up a release by Welch, to which Prior replied that Welch, before the release, had assigned the debt due by reason of the covenant to him, of which the defendant had notice. The court consider the effect of certain bills of exchange, and say: "But where the order is drawn either on a general or a particular fund for a part only it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft;" that "a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor;" and that "if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit."

The equitable doctrine now maintained by the Supreme Court of the United States is shown by Wright *v.* Ellison, 1 Wall. 16; Christmas *v.* Russell, 14 Wall. 69; Trist *v.* Child, 21 Wall. 441; and Peugh *v.* Porter, 112 U. S. 737. In Peugh *v.* Porter, that court ordered that a decree be entered that Peugh, subject to certain rights in the estate at Winder, was entitled to one fourth of a fund, by

virtue of an assignment of one fourth of a claim against Mexico, made before the establishment of the claim from which the fund was derived, and before the fund was in existence, and declared the law to be that "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." In Robbins *v.* Bacon, *ubi supra,* the order was for the payment of the whole of a particular fund, and was held good.

The existing law of Maine is declared in National Exchange Bank *v.* McLoon, 73 Maine, 498, by an elaborate opinion, and the conclusion reached is that an assignment of a part of a chose in action is good in equity, and against a trustee process.

In England it is held that the particular fund or debt out of which the payment is to be made must be specified in the assignment (Percival *v.* Dunn, 29 Ch. L. 128); but the assignment of a part of a debt or fund is good in equity. The present case is like *Ex parte* Moss, 14 Q. B. D. 310, and a stronger case for the plaintiff than Brice *v.* Bannister, 3 Q. B. D. 569, where, although the procedure was under the St. of 36 & 37 Vict. c. 66, the foundation of the liability was that the assignment was good in equity; and the case at bar is relieved from the difficulties which induced Brett, L. J., in that case to dissent; and Brice *v.* Bannister was approved in *Ex parte* Hall, 10 Ch. D. 615. The present case also resembles Tooth *v.* Hallett, L. R. 4 Ch. 242, except that there the sums paid by the trustee for creditors in finishing the house exhausted all that became due under the contract. See also Addison *v.* Cox, L. R. 8 Ch. 76.

In Appeals of Philadelphia, 86 Penn. St. 179, it is conceded that the rule that an assignment of a part of a debt is valid prevails in equity between individuals; but the court refused to apply it to a debt due from a municipal corporation, on the ground that "the policy of the law is against permitting individuals, by their private contracts, to embarrass the principal officers of a municipality." See Geist's appeal, 104 Penn. St. 351. But there is no ground for any such distinction in this Commonwealth.

In New York the assignment of a part of a debt or fund is good in equity. Field *v.* Mayor, 2 Seld. 179; Risley *v.* Phenix Bank, 83 N. Y. 318. And the same doctrine is maintained in other States. Daniels *v.* Meinhard, 53 Ga. 359; Etheridge *v.* Vernoy, 74 N. C. 809; Lapping *v.* Duffy, 47 Ind. 51; Fordyce *v.* Nelson, 91 Ind. 447; Bower *v.* Hadden Blue Stone Co., 3 Stew. (N. J.) 171; Gardner *v.* Smith, 5 Heisk. 256; Grain *v.* Aldrich, 38 Cal. 514; Des Moines *v.* Hinkley, 62 Iowa, 637; Canty *v.* Latterner, 31 Minn. 239; First National Bank *v.* Kimberlands, 16 W. Va. 555.

From the examination of our cases, it appears not to have been decided that there cannot be an assignment of a part of a fund or debt which will constitute an equitable lien or charge upon it, and

be enforced in equity against the debtor or person holding the fund. Palmer *v.* Merrill, *ubi supra,* may well rest upon the first reason given for the decision. See Stearns *v.* Quincy Ins. Co., 124 Mass. 61–63. The decisions of courts of equity in other jurisdictions are almost unanimous in maintaining such a lien where the assignment is for value, distinctly appropriates a part of the fund or debt, and makes the sum assigned specifically payable out of it.

Without undertaking to decide what is not before us, and confining ourselves to the facts in the case, which are that the debt is admitted and remains unpaid, and the debtor in his answer asks the court to determine the rights of the different claimants, we think that there should be a decree that the city of Newton pay to the plaintiff $600; and that the remainder of the sum due from the city, after deducting its costs, be paid to Gilkey, assignee.

The assignment was not made in fraud of the laws relating to insolvency. *So ordered.*[1]

RICHARD J. DONOVAN, Appellant, *v.* FREDERICK J. MIDDLEBROOK, and others, Respondents

New York Supreme Court, Appellate Division, June, 1904

[*Reported in* 95 *New York Appellate Division,* 365]

McLaughlin, J.: This appeal is from a judgment dismissing the complaint at the close of plaintiff's case. The action was brought to recover one-half of broker's commissions in the sale of real estate under an alleged assignment. The complaint alleged, in substance, that in March or April, 1903, the defendants employed one Joseph Toch to secure a purchaser for certain real estate in the city of New York, and agreed if successful to pay him a commission of two per cent of the purchase money; that Toch, with the aid and influence of one Horowitz, produced a purchaser to whom the property was sold for $325,000; that Toch thereupon, in consideration of the services of Horowitz, entered into the following agreement with him, which was confirmatory of a previous oral agreement:

"In consideration of one (1) dollar I hereby agree with Salo A. Horowitz, representing Mr. Ralph C. Gerlach in the purchase of the Ryan property from Mary Ryan and Frederick J. Middlebrook, executor, that said Horowitz is entitled to one-half of the commission earned, amounting to $3,250.00, resulting from said sale.

"Dated New York, *April 6th,* 1903.

"Joseph Toch."

[1] The authorities on the effect of partial assignments are collected in Ames's Cas. on Trusts (2d ed.), 63 *n.*; 1 Williston, Contracts, § 441.

That, by this agreement, Toch assigned to Horowitz one-half of the commission earned, of which fact the defendants were informed, and prior to the commencement of the action such claim was duly assigned to the plaintiff and judgment demanded for $3,250. The answer, among other defenses pleaded, denied substantially all of the material allegations of the complaint upon which plaintiff's right to a recovery was predicated.

At the trial the agreement above set forth between Toch and Horowitz was introduced in evidence and this constituted plaintiff's entire proof as tending to show that any claim which Toch had against the defendants for the commissions earned had been assigned by him to the plaintiff's assignor. Upon this proof the complaint was dismissed, the trial court holding that such agreement did not constitute an assignment of the commission alleged to have been earned by Toch, or any part of it. This ruling of the trial court is challenged, it being urged that the instrument constituted an assignment of one-half of the commissions. The action is at law. The plaintiff predicates his right to a recovery upon the fact that the defendants were indebted to Toch, and Toch assigned a portion of that indebtedness to his assignor. The only evidence of the assignment is the paper referred to, and a bare inspection of it shows, as it seems to me, that it did not constitute an assignment. There are no words in it which either expressly or inferentially can be said to transfer any interest in the claim which Toch had against the defendants to plaintiff's assignor. The agreement is between Toch and Horowitz. At most it is an agreement on the part of Toch to pay to Horowitz one-half of what the defendants are to pay to him. The fact that the plaintiff called this paper an assignment did not make it so. (Wemple *v.* Hauenstein, 19 App. Div. 552.) To constitute a valid assignment there must be a perfected transaction between the parties intended to vest in the assignees a present right in the thing assigned. An agreement to pay a certain sum out of, or that one is entitled to receive, from a designated fund, when received, does not operate as a legal or equitable assignment, since the assignor in either case retains control over the subject-matter. "The test is," even of an equitable assignment, "whether the debtor would be justified in paying the debt or the portion contracted about to the person claiming to be assignee." (Fairbanks *v.* Sargent, 117 N. Y. 320.) "It is the settled doctrine in this State," says the court in Thomas *v.* N. Y. & G. L. R. Co. (139 N. Y. 163), "that an agreement, either by parol or in writing, to pay a debt out of a designated fund, does not give an equitable lien upon the fund or operate as an equitable assignment thereof." In Williams *v.* Ingersoll (89 N. Y. 508) Judge EARL said: "Whatever the law may be elsewhere, it must be regarded as the settled law of this State, that an agreement either by parol or in writing to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an

equitable assignment thereof. It was so decided in Rogers *v.* Hosack's Executors (18 Wend. 319). That case was followed, and the same rule laid down in Christmas *v.* Russell (14 Wall. 69) and Trist *v.* Child (21 id. 441)."

The paper in question, as already indicated, did not constitute an assignment and the trial court was correct in so holding.

The judgment is right and should be affirmed, with costs.

PATTERSON, O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Judgment affirmed, with costs.

SECTION III

JOINT OBLIGATIONS

MARCH *v.* WARD

AT NISI PRIUS, June 30, 1792

[*Reported in Peake's Cases,* 130]

ASSUMPSIT on a promissory note made by the defendant and one Bowling, in the following words, viz:

"I promise to pay three months after date, to Wm. March, £8 5*s.* for value received in fixtures.

"ROBERT BOWLING.
"THOMAS WARD."

It was objected that this promissory note was joint only, and not several.

LORD KENYON. I think that this note, beginning in the singular number, is several as well as joint, and that the present action may be maintained on it. I remember a case tried before Mr. Moreton at Chester, exactly similar to the present, wherein I was counsel for the defendant; I persuaded the judge that it was a joint note only, and the plaintiff was nonsuited, but on an application being afterwards made to this Court, they were of a contrary opinion, and a new trial was granted. The letter I applies to each severally.

Verdict for the plaintiff.[1]

[1] The obligation is joint and several. Bank of Louisiana *v.* Sterling, 2 La. 62; New Orleans *v.* Ripley, 5 La. 122; Hemmenway *v.* Stone, 7 Mass. 58; Van Alstyne *v.* Van Slyck, 10 Barb. 383; Dill *v.* White, 52 Wis. 456; Neg. Instruments Law. Sec. 17 (7).

"If two, three, or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is, and shall be taken to be joint only, and not several." Shep. Touch. 375. See also Jernigan *v.* Wimberly, 1 Ga. 220; Bank of Louisiana *v.* Sterling, 2 La. 62; New Orleans *v.* Ripley, 5 La. 122; Meyer *v.* Estes, 164 Mass. 457. But see *contra*, Morange *v.* Mudge, 6 Abb. Prac. 243.

"If three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must either sue them all or each of them separately. And though

THE CITY OF PHILADELPHIA *v.* REEVES AND CABOT

PENNSYLVANIA SUPREME COURT, 1865

[*Reported in* 48 *Pennsylvania,* 472]

ERROR to the District Court of Philadelphia.

This was an action of covenant, by the City of Philadelphia against Samuel J. Reeves and Joseph Cabot, as sureties of Fort Ihrie. After a declaration in the usual form, on a covenant dated May 9th, 1859, between the plaintiff and defendants, for the use of a wharf or landing at the foot of Callowhill Street, on the river Delaware; the defendants craved *oyer* of the instrument on which suit was brought.

The plaintiffs thereupon placed on record a copy of the following instrument: —

"Memorandum. The City of Philadelphia demise to Fort Ihrie the wharf or landing at the foot of Callowhill Street, on the river Delaware, and the pier and wharf next south thereof, being the same premises heretofore called and known as the Callowhill Street Ferry and Landing, for the term of three years from April 25th, 1859, at the annual rent of twenty-three hundred dollars, payable quarterly: the first payment to be made on the 25th day of July, 1859; and if the rent shall remain unpaid on any day on which the same ought to be paid, then the lessors may enter on the premises and proceed, by distress and sale of the goods there found, to levy the rent and all costs. The lessee and his sureties, Joseph Cabot and Samuel J. Reeves, covenant with the lessors to pay the rent punctually as above provided for, and the lessee covenants during the term to keep, and at the end thereof peaceably to deliver up the premises in good order and repair, reasonable wear and tear and damage by accidental fire excepted, and not assign this lease or underlet the premises, or any part thereof.

"And if the lessee shall in any particular violate any one of his said covenants, then the lessors may cause a notice to be left on the premises of their intention to determine this lease, and at the expiration of ten days from the time of so leaving such notice, this lease shall absolutely determine; and upon the expiration or other determination of this lease, any attorney may immediately thereafter, as attorney for the lessee, sign an agreement for entering, in any competent court, an amicable action and judgment in ejectment (without any stay of execution) against the lessee, and all persons claiming under him, for the recovering by the lessors of possession of the hereby demised premises, for which this shall be a sufficient warrant; and the lessee thereby releases to the lessors all errors and defects whatsoever in entering such action or judgment, or in any proceeding thereon, or concerning the same. No such determination of this lease, nor taking or recovering possession of the premises, shall deprive the lessors of any action against the lessee or his sureties for the rent, or against the lessee for damages. All rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the heirs, executors, administrators, successors, and assigns of such party.

"In witness whereof the lessee and his sureties have hereunto set their hands and seals, and the corporate seal of the lessors has been hereunto affixed by the mayor of the city of Philadelphia, this 9th day of May, A.D. 1859, the said lease having been awarded prior to the election of the said lessee as a member of common council.

"FORT IHRIE. [SEAL.]
"SAMUEL J. REEVES. [SEAL.]
"JOSEPH CABOT. [SEAL.]

"(Signed)

"Sealed and delivered in
the presence of E. B. MCDOWELL.
[SEAL.]

"ALEXANDER HENRY,
"Mayor of Philadelphia."

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that doctrine has been several times questioned, yet it has been held good law from the time of Lord Coke." Streatfield *v.* Halliday, 3 T. R. 779, 782; Stevens *v.* Catlin, 152 Ill. 56, 58, *acc.*

This instrument being read and heard, the defendants by their attorney prayed judgment of the said writ and declaration, because the supposed covenant in the said declaration mentioned, if any such were made, was jointly made with Fort Ihrie, who sealed and delivered also the said deed, who is still living, to wit, &c., and not by the said Samuel J. Reeves and Joseph Cabot alone, wherefore, inasmuch as the said Fort Ihrie is not named in the said writ and declaration together with the said Samuel J. Reeves and Joseph Cabot, they, the said Samuel J. Reeves and Joseph Cabot, prayed judgment of the writ and declaration, and that the same may be quashed, &c.

To this the plaintiff demurred, and stated the following cause of demurrer, viz., "that the instrument of which there has been *oyer,* shows on the face thereof that the said defendants are bound as sureties for the said Fort Ihrie, and that by reason of the subject-matter the said covenant is not jointly with said Fort Ihrie," &c.

The court below entered judgment for the defendants on the demurrer, which was the error assigned.

David W. Sellers and *F. Carroll Brewster,* for plaintiff in error.

E. Spencer Miller, for defendants in error.

The opinion of the court was delivered, January 25th, 1865, by

Strong, J. That the covenant for the payment of rent, upon which this suit was brought, imposed upon the defendants only an obligation jointly with Fort Ihrie, their principal, is too clear for doubt. It is a general presumption of law, when two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption. In all written contracts, therefore, whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the instruments, and at them alone. The subject-matter of the contract, and the interests of the parties assuming a liability, have nothing to do with the question. It may be otherwise with respect to the rights of the covenantees, where there are more than one. There are not wanting cases in which it has been held that when the interests of the covenantees are several, they may sue severally, though the terms of the covenant upon which they sue are strictly joint.[1] Even this, however, has been doubted. But, however it may be with the rights of covenantees, it is a settled rule that whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. And the language of severalty or joinder is the test.[2] The covenant is

[1] Goldsmith *v.* Sachs, 17 Fed. Rep. 726; Burton *v.* Henry, 90 Ala. 281; St. Louis &c. R. R. Co. *v.* Coultas, 33 Ill. 189; Haskins *v.* Lombard, 16 Me. 140; Jacobs *v.* Davis, 34 Md. 204; Alpaugh *v.* Wood, 53 N. J. L. 638, 644; L. L. Satler Lumber Co. *v.* Exler, 239 Pa. 135; Gazley *v.* Wayne, 36 Tex. 689; Sharp *v.* Conkling, 16 Vt. 355; Anderson *v.* Nichols, (Vt.) 107 Atl. 116, *acc.*

[2] But promisors on subscription papers are held to promise severally though the language is appropriate for a joint promise. Davis, &c. Co. *v.* Barber, 51 Fed. Rep

always joint, unless declared to be otherwise: Enys *v.* Donnithorne, 2 Burrows, 1190; Philips *v.* Bonsall, 2 Binn. 138. It is true, that in the covenant to pay rent, contained in the lease to Fort Ihrie, the two defendants are described as sureties, but they and the lessee undertook to pay the rent as one party. Their being described as sureties cannot be regarded as a declaration of intent to undertake severally. Nor does the covenant contain any words of several liability for rent. The defendants assumed no other obligation than that they and the lessee would pay. The case is indubitably within the general rule that a covenant by two or more is joint as to them, if not expressly declared several, or joint and several. The plea in abatement was therefore correctly sustained, and the judgment on the demurrer was right. *The judgment is affirmed.*[1]

RICHARDS AND ANOTHER *v.* HEATHER

IN THE KING'S BENCH, November 6, 1817

[*Reported in* 1 *Barnewall & Alderson,* 29]

ASSUMPSIT for work and labor. The declaration contained only one set of counts, charging the defendant in his own right. Plea, non assumpsit. At the trial before Abbott, J., at the last spring assizes for the county of Southampton, the plaintiff proved two distinct demands; one due from the defendant individually, the other in respect of work done upon a ship, which had belonged to the defendant, and one Rous, who had, jointly with the defendant, given directions for the work, and who was dead at the time of action brought. The learned judge entertaining a doubt whether in respect of this last demand the defendant should not have been charged as surviving partner, directed the jury to find a verdict for the whole sum claimed, with liberty to the defendant to move to reduce it to the amount of the first demand only, if the court should be of that opinion. Accordingly, Pell, Serjt., in Easter Term last, obtained a rule nisi for that purpose; and now

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148; Price *v.* Railroad Co., 18 Ind. 137; Landwerlen *v.* Wheeler, 106 Ind. 523; Hall *v.* Thayer, 12 Met. 130; Davis *v.* Belford, 70 Mich. 120; Gibbons *v.* Bente, 51 Minn. 499; Cornish & Co. *v.* West, 82 Minn. 107. But see *contra*, Davis *v.* Shafer, 50 Fed. Rep. 764; Darnell *v.* Lyon, 85 Tex. 455. See further 22 L. R. A. 80, *n.;* L. R. A. 1915 B 224.

[1] Illustrations of the rule that obligations are presumptively joint may be found in Byers *v.* Doby, 1 H. Bl. 236; Hill *v.* Tucker, 1 Taunt. 7; Mansell *v.* Burredge, 7 T. R. 352; Hatsall *v.* Griffith, 4 Tyr. 487; Crosby *v.* Jeroloman, 37 Ind. 264; Eller *v.* Lacy 137 Ind. 436; Field *v.* Runk, 2 Zab. 525; Alpaugh *v.* Wood, 53 N. J. L. 638; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680, 698; Muzzy *v.* Whitney, 10 Johns. 226; Stage *v.* Olds, 12 Ohio, 158. Compare Shipman *v.* Straitsville Co., 158 U. S. 356; Davis, &c. Co. *v.* Jones, 66 Fed. Rep. 124; Des Moines Co. *v.* York Co., 92 Ia. 396; Colt *v.* Learned, 118 Mass. 380; Ernst *v.* Bartle, 1 Johns. Cas. 319. But *contra*, by statute. Pecquet *v.* Pecquet, 17 La. Ann. 204; Stowers *v.* Blackburn, 21 La. Ann. 127; Burney *v.* Ludeling, 47 La. Ann, 73; Clough *v.* Holden, 115 Mo. 336.

Gaselee and *A. Moore* showed cause.

Pell, Serjt., *contra.*

Lord Ellenborough, C. J. I am of opinion that the plaintiff is entitled to both the sums which he seeks to recover under this declaration. It would be more convenient in all cases, where a debt accrues from the defendant as surviving partner, to declare against him accordingly, because it is convenient to make the forms of declaration subservient to the information of the party charged; but it is not essentially necessary to the maintenance of the action, for where there are several partners who are living, one of them may be declared against as the sole debtor, and the only objection to this mode of declaring is, that the plaintiff is liable to be turned round, by a plea in abatement.[1] But inasmuch as where the other partner is dead there cannot be any plea in abatement, *cessante ratione, cessat lex.* The reason which requires that the demand shall be stated as a joint demand ceases when a plea in abatement can be no longer pleaded. It seems to me, therefore, that the plaintiff may maintain his action, as well for the demand for which the defendant was liable individually, as for that for which he was liable jointly with the other partner, who is now dead. According to every principle of law, the joint debt may, by reason of the death of the party, be now treated as if it had been originally a separate debt. I think therefore there is not any occasion to make any distinction in the declaration on account of the sources from which the debts originally sprung.

Bayley, J. I think that the plaintiff is entitled to recover both sums, and that the doctrine in Spalding *v.* Mure cannot be supported. Upon a count for work and labor, goods sold and delivered, and money had and received, &c., a plaintiff may recover all such demands as fall within the range of that count; if he has twenty demands he may recover each and every particular demand to which that count is applicable. Supposing there had been one demand only, namely, a separate demand, could plaintiff have been prevented from recovering that demand on this declaration, on the ground of a variance? Certainly not; it is true in respect of that demand he is solely indebted. Then as to the demand which was due from the defendant and Rous jointly, the work was done for each, and each was liable for the whole; this is the argument adopted by Lord Mansfield in Rice *v.* Shute, 5 Burr, 2613: "All contracts with partners are joint and several; every partner is liable to pay the whole." Proving that another person contracted does not negative that the defendant himself contracted. If that be the case, and if the work

[1] Rice *v.* Shute, 5 Burr, 2611; Mountstephen *v.* Brooke, 1 B. & Ald. 224; First Nat. Bank *v.* Hamor, 49 Fed. Rep. 45 (C. C. A.); Elder *v.* Thompson, 13 Gray, 91; Coon *v.* Anderson, 101 Mich. 295; Davis *v.* Chouteau, 32 Minn. 548; Sandwich Mfg. Co. *v.* Kimberly, 37 Minn. 214; Maurer *v.* Midway, 25 Neb. 575; Beeler *v.* Bank, 34 Neb. 348; Lieberman *v.* Brothers, 55 N. J. 379; Nash *v.* Skinner, 12 Vt. 219; Hicks *v.* Cram, 17 Vt. 449; Wilson *v.* McCormick, 86 Va. 995, *acc.*

which was originally done for Rous and Heather was originally done for either, it follows that it may be truly predicated that the defendant was solely indebted for work and labor done for him; and then I do not see upon what principle the plaintiff can be prevented from recovering for this demand also under this declaration.

Abbott, J. I am of the same opinion. The question was reserved, in consequence of a doubt suggested by me upon the form of the declaration; and my doubt was, whether it was not necessary to charge the defendant, as surviving partner, in respect of the last demand. My doubt did not arise in respect of there being evidence given of two distinct demands, but in respect of the form of the declaration, as applicable to the last demand. It is possible that I may have had an indistinct recollection of what fell from the court in Spalding *v.* Mure, but I now think that the doctrine there laid down is not law. By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint. In Whelpdale's case, 5 Rep. 119, the plaintiff had declared on a bond made by the defendant, to which the defendant pleaded *non est factum;* the jury found that the bond was a joint bond, made by the defendant and another to the plaintiff, and upon this special verdict it was adjudged by the court that the plaintiff should recover; "because when two men are *jointly* bound in one bond, although neither of them is bound by himself, yet neither of them can say that the bond is not his deed; for he has sealed and delivered it, and each of them is bound in the whole." That was a case upon a deed, but Rice *v.* Shute was a case upon a simple contract; and it was there held that although the promise was a joint promise, yet the defendant, who was sued alone, could not say that he did not promise; and that the only way of taking advantage of the omission of the other joint contractor was by plea in abatement. These two cases establish this, that proof of a joint contract is sufficient to sustain an allegation that one contracted; and therefore there is no variance; and if not, then the proof given in this case was competent to sustain the declaration in respect of both demands, and this rule must be discharged.

Holroyd, J. I think that the proof was properly received. The declaration charges that the defendant was indebted in a certain sum, for work and labor, which he promised to pay. Under this declaration the plaintiff would not be entitled to recover anything, except for a ground of action corresponding with that stated in the declaration. Now it is not disputed but that the joint demand was a demand coming within the description of work and labor; and if the defendant had been alone sued for it without the other, the plaintiff might have recovered, because there would not have been any variance. It seems to me, therefore, this demand may now be recovered, although there was a separate cause of action.

Rule discharged.

JELL *v.* DOUGLAS

IN THE KING'S BENCH, EASTER TERM, 1821

[*Reported in* 4 *Barnewall & Alderson,* 374]

ASSUMPSIT for goods sold and delivered by Jell to the defendant. Plea, general issue. At the trial, before Abbott, C. J., at the last summer assizes for the county of Kent, the proof was, that the goods were sold to the defendant by the plaintiff and his son, who were in partnership. The son had died before the commencement of this action. It was contended that this was a variance, inasmuch as the contract stated in the declaration was with the plaintiff alone; whereas that given in evidence was with the plaintiff and another. Abbott, C. J., reserved the point, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* for that purpose having been obtained in last Michaelmas Term, —

Marryat and *Chitty* now showed cause.

ABBOTT, C. J. It is a well-established rule that where two persons are joint-sellers of goods, they must both join in an action brought to recover the price. It was decided in Richards *v.* Heather, 1 B. & A. 29, that a party may maintain an action against a surviving partner without describing him as such; and the reason of that decision was this, that if the partners had been alive, and one only was sued, that circumstance could only be taken advantage of by plea in abatement, and was no defence upon the general issue. But if one of two joint contractors sue, both being alive, that is a variance,[1] and a good defence upon the general issue.[2] It seems, therefore, to be reasonable that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration. In a note to Weber *v.* Tivill, 2 Saund. 121, *n.* 1, Mr. Serjt. Williams lays it down, that it is necessary that all the persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated. From my own experience I can say that that has been the general practice, and I think ought not to have been departed from in this instance. The rule for a nonsuit must be made absolute. *Rule absolute.*

Gurney and *Comyn* were to have argued in support of the rule.

[1] Chanter *v.* Leese, 4 M. & W. 295, *acc.*

[2] Or, if the record shows the defect, by demurrer or motion in arrest of judgment. Petrie *v.* Bury, 3 B. & C. 353; Pugh *v.* Stringfield, 3 C. B. N. S. 2; Wetherell *v.* Langston, 1 Ex. 634; Beach *v.* Hotchkiss, 2 Conn. 697; Baker *v.* Jewell, 6 Mass. 460; Wiggin *v.* Cummings, 8 Allen, 353; Davis *v.* Chouteau, 32 Minn. 548; Ehle *v.* Purdy, 6 Wend. 629.

KING AND ANOTHER v. HOARE

IN THE EXCHEQUER, November 25, 1844

[*Reported in* 13 *Meeson & Welsby,* 494]

PARKE, B. The plea in this case, to an action of debt, stated that the contract in the declaration was made by the plaintiff with the defendant and one N. T. Smith jointly, and not with the defendant alone; and that, in 1843, the plaintiff recovered a judgment against Smith for the same debt, with costs, "as appears by the record remaining in the Court of Queen's Bench, which judgment still remains in full force and unreversed," concluding with the common verification.[1]

To this plea there was a demurrer, assigning several special causes: First, that it was a plea in abatement not properly pleaded; to which the answer is, that the plea does not give a better writ, and is clearly a plea in bar. Secondly, that it amounts to the general issue, which it certainly does not, for it admits a debt originally due. Thirdly, that it does not aver that the debt was not due from the defendant and Smith severally, as well as jointly; to which it was properly answered that the plea sufficiently shows the identical contract declared upon to be joint, and that it cannot be contended, *prima facie* at least, that the same contract was both joint and several.

The matter of form being disposed of, the question is reduced to one of substance: whether a judgment recovered against one of two joint contractors is a bar in an action against another.

It is remarkable that this question should never have been actually decided in the courts of this country. There have been, apparently, conflicting dicta upon it. Lord Tenterden, in the case of Watters *v.* Smith, 2 B. & Ad. 892, is reported to have said that a mere judgment against one would not be a defence for another. My brother Maule stated, in that of Bell *v.* Bankes, 3 Man. & G. 267, that a security by one of two joint debtors would merge the remedy against both. In the case of Lechmere *v.* Fletcher, 1 C. & M. 634, Bayley, B., strongly intimates the opinion of the Court of Exchequer, that the judgment against one was a bar for both of two joint debtors; though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle, and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the plea is good.

If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be use-

[1] The discussion of the propriety of this conclusion is omitted

less and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam,* — the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus it has been held that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause. Brown *v.* Woottom, Yelv. 67; and s. c., Cro. Jac. 73; and Moor, 762. And though, in the report in Yelverton, expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice Popham states the true ground. He says, "If one hath judgment to recover in trespass against one, and damages are certain" (that is, converted into certainty by the judgment), "although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *e contra,* if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two is, because there every of them is chargeable, and liable to the entire debt; and therefore a recovery against one is no bar against the other, until satisfaction." And it is quite clear that the Chief Justice was referring to the case of a joint and several obligation, both from the argument of the counsel, as reported in Cro. Jac., and the statement of the case in Yelverton.

We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tortfeasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action.

The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies

to the obligee. Another mode of considering this case is suggested by Bayley, B., in the case of Lechmere *v.* Fletcher, and was much discussed during the argument, and leads us to the same conclusion. If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement, or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt, barred against one, is barred altogether; the only exception now being where one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined, and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one of two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly, and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party.

During the argument, a decision of the Chief Justice Marshall, in the Supreme Court of the United States, was cited as being contrary to the conclusion this court has come to; the case is that of Sheehy *v.* Mandeville. We need not say we have the greatest respect for every decision of that eminent judge, but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided that, in an action against two on a joint note, a judgment against one was a bar. Ward *v.* Johnson, 13 Mass. 148.

For these reasons we are of opinion that our judgment must be for the defendant. *Judgment for the defendant.*[1]

[1] Mason *v.* Eldred, 6 Wall. 231 (overruling Sheehy *v.* Mandeville, 6 Cranch,) 254; Trafton *v.* United States, 3 Story, 651; Brady *v.* Reynolds, 13 Cal. 31; Wann *v.* McNulty, 2 Gilm. 359; Moore *v.* Rogers, 19 Ill. 347; Crosby *v.* Jeroloman, 37 Ind. 264; Ward *v.* Johnson, 13 Mass. 148; Cowley *v.* Patch, 120 Mass. 137; Davison *v.* Harmon, 65 Minn. 402; Robertson *v.* Smith, 18 Johns. 459; Candee *v.* Smith, 9; N. Y. 349; Ryckman *v.* Manerud, 68 Oreg. 350; McFarlane *v.* Kipp, 206 Pa. 317; Lauer *v.* Bandow, 48 Wis. 638, *acc.* But otherwise by statute in many jurisdictions. The law of each state is separately considered in 1 Williston, Contracts, § 336.

WILLIAM HALE *v.* LEONARD V. SPAULDING

SUPREME JUDICIAL COURT OF MASSACHUSETTS, November 3, 1887–January 4, 1888

[*Reported in* 145 *Massachusetts,* 482]

CONTRACT, upon an instrument under seal, dated May 23, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff, on demand, six sevenths of any loss to which he might be subjected as the indorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract:

"Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document" signed, &c., and dated May 23, 1885.

At the trial in the Superior Court, before HAMMOND, J., it appeared that on September 20, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. H. Moody, for the plaintiff.

H. N. Merrill, for Saltmarsh.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule, that a release to one joint obligor releases all. Wiggin *v.* Tudor, 23 Pick. 434, 444; Goodnow *v.* Smith, 18 Pick. 414; Pond *v.* Williams, 1 Gray, 630, 536. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 433; 2 Chit. Con. (11th Am. ed.) 1154 *et seq.*; *Ex parte* Good, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is, that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue. See Kenworthy *v.* Sawyer, 125 Mass. 28; Willis *v.* De Castro, 4 C. B. (N. S.) 216; North *v.* Wakefield, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. Tuckerman *v.* Newhall, 17 Mass. 580, 585. The instrument given in this case was a mere

receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release. *Exceptions overruled.*[1]

PRICE, Public Officer, &c., *v.* BARKER AND CLARK, Executors of GEORGE HOPPS

In the Queen's Bench, February 22, 1855

[*Reported in* 4 *Ellis & Blackburn,* 760]

Coleridge, J., now delivered the judgment of the Court.

This was an action by the public officer of a banking Company against the executors of George Hopps. The declaration was on a bond conditioned for the security to the bank of a banking account of one William Brown. The plea set out the bond, which was the joint and several writing obligatory of the said George Hopps and William Brown, and then set out a general release, made after the accruing of the causes of action, and averred that the release was made in the lifetime of the said George Hopps without the privity, knowledge, authority, or consent of the said George Hopps. The replication set out the release, which, after general words of release, contained the following proviso. "Provided always, that nothing herein contained shall extend, *or be deemed or construed to extend, to prevent* the said Banking Company, their successors or assigns, or the partners for the time being constituting the said Company," *"from suing or prosecuting any person* or persons, other than the said William Brown, his executors, administrators, or assigns, who is, are, shall or may be liable or accountable to pay or make good to the said Banking Company all or any part of any debt or debts, sum or sums of money, now due from the said William Brown to the said Company, either as drawer, indorser, or acceptor of any bill or bills of exchange or promissory note or notes, or as being jointly or severally bound with the said William Brown in any bond or bonds, obligation or obligations, or other instrument whatsoever, or otherwise howsoever, as if these presents had not been executed: it being understood and agreed that, as regards any such suits or prosecutions, these presents shall not operate or be pleaded in bar, or as a release."

To this replication the plaintiff demurred: and the demurrer was argued before us in the course of the Term.

[1] *Re* E. W. A., [1901] 2 K. B. 642; Allin *v.* Shadburne, 1 Dana, 68; Lunt *v.* Stevens, 24 Me. 534; Rowley *v.* Stoddard, 7 Johns. 207; Newcomb *v.* Raynor, 21 Wend. 108; Goldbeck *v.* Bank, 147 Pa. 267; Maslin *v.* Hiett, 37 W. Va. 15, *acc.* Compare Watters *v.* Smith, 2 B. & Ad. 889; Field *v.* Robins, 8 A. & E. 90; Bender *v.* Been, 78 Ia. 283; Young *v.* Currier, 63 N. H. 419; Crafts *v.* Sweeney, 18 R. I. 730.

On the argument two questions arose:

1st, Whether the general words of the release were restrained by the proviso, so that, in order to give effect to the whole instrument, we must construe it as a covenant not to sue, instead of a release.

And, 2dly, Assuming the deed to operate merely as a covenant not to sue, whether the reservation of rights against other parties than the principal debtor contained in the proviso would prevent the surety from being discharged by a binding covenant to give time to, or not to sue, the principal debtor.

To entitle the plaintiff to our judgment, it must appear that the deed operated only as a covenant not to sue, and that the rights of the plaintiff as against the surety were preserved by the particular reservation in question, notwithstanding such covenant not to sue.

With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman, in Nicholson *v.* Revill, 4 A. & E. 675, as explained by Baron Parke in Kearsley *v.* Cole, 16 M. & W. 136, that if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved: and we think that we are bound by modern authorities (see Solly *v.* Forbes, 2 Br. & B. 38; Thompson *v.* Lack, 3 Com. B. 540; and Payler *v.* Homersham, 4 M. & S. 423) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release. It is impossible to suppose for a moment that the parties to this deed could have contemplated the extinguishment of their rights as against parties jointly liable. It was argued, indeed, that the particular words of the proviso in the present case prevented this construction by appearing to recognize that Brown was not to be sued, and that, in an action against him, the deed was to operate as a release and might be pleaded at bar. The words, however, that the proviso was not to extend to prevent the bank from suing or prosecuting any person or persons other than the said defendant or his representatives, which were said to show that Brown was not to be sued, are quite as applicable to a covenant not to sue as to a release; and the later general words in the conclusion of the deed

"that, as regards any such suits or prosecutions" (against parties jointly liable), "these presents shall not operate or be pleaded in bar," are, we think, like the words of actual release, too general to prevent us by inference from giving effect to the plainly expressed intention that the parties jointly liable should not be discharged by an extinguishment of the debt. If, therefore, the testator, whom the defendants represent, had been in the situation of co-obligor merely we should think that he was not discharged by the deed.

It remains, however, in the second place, to consider what effect the deed had upon his liabilities in reference to his relations as surety for Brown, the principal debtor. It was thrown out, indeed, in argument, that we were bound to consider him as a principal debtor and not as a surety upon this bond, the obligatory part of the bond being joint and several without any reference to either being surety or principal. But, for the purpose of seeing the relation of the parties, we must look at the condition of the bond, as set out upon the pleadings, which plainly discloses that the defendant was a surety for the liabilities of Brown.

If the question, whether a covenant not to sue, qualified by such a proviso as that in the present case, and entered into by the creditor without the consent of the surety, discharges the surety, were a new one unaffected by authority, we should pause before deciding that such a case does not fall within the general rule of the creditor discharging a surety by entering into a binding agreement to give time to his principal debtor; and we should have thought the forcible observations of Lord Truro in the recent case of Owen *v.* Homan, 3 Macn. & G. 378, entitled to much consideration. We find, however, that the Court of Exchequer in a solemn and well-considered judgment, in the case of Kearsley *v.* Cole, 16 M. & W. 128, 136, after referring to all the authorities, states that the point must "be considered as settled":[1]

It seems to be the result of the authorities that a covenant not to sue, qualified by a reserve of the remedies against sureties, is to allow the surety to retain all his remedies over against the principal debtor; and that the covenant not to sue is to operate only so far as the rights of the surety may not be affected.

Probably many deeds of this nature are framed continually on the supposition that the law has been supposed to be settled, in the manner stated in the Exchequer, since the time of Lord Eldon: and we think that, sitting as a Court of coördinate jurisdiction with the Exchequer, we ought not to disturb the law stated by them in a solemn judgment to be clearly settled.

Our judgment, therefore, upon the demurrer in the present case is in favor of the plaintiff. *Judgment for the plaintiff.*[2]

[1] A portion of the opinion is here omitted.

[2] See also Willis *v.* De Castro, 4 C. B. N. S. 216; Bateson *v.* Gosling, L. R. 7 C. P. 9; Cragoe *v.* Jones, L. R. 8 Ex. 81; Line *v.* Nelson, 38 N. J. L. 358.

In New York Bank Note Company *v.* Kidder Press Mfg. Co. 192 Mass. 391, 408, the

MARTIN *v.* CRUMP

IN THE KING'S BENCH, EASTER TERM, 1698

[*Reported in* 2 *Salkeld,* 444]

Two joint merchants make B their factor; one dies, leaving an executor; this executor and the survivor cannot join, for the remedy survives, but not the duty; and therefore on recovery he must be accountable to the executor for that.[1]

CHARLES H. DAVIS ET AL, APPELLANTS, *v.* MYNDERT VAN BUREN, EXECUTOR, ETC., RESPONDENT

NEW YORK COURT OF APPEALS, February 18–22, 1878

[*Reported in* 72 *New York,* 587]

PER CURIAM. One Bixbee was arrested at the suit of the plaintiffs, in an action commenced against him by them in the New York Common Pleas, and to procure his discharge from such arrest, he,

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Court said: "Although the breach of the contract in itself was not a tort, it was entitled to but one satisfaction of damages, whether obtained by compromise when unliquidated or by payment after the amount has been ascertained and adjudicated. Vanuxem *v.* Burr, 151 Mass. 386, 388, 389. In Stimpson *v.* Poole, 141 Mass. 502, 505, it was said 'money paid, which is to be in full for an unliquidated or a disputed claim, is taken in discharge of it, and constitutes a full defence against any further assertion of the claim. What has been received is in law deemed to be a satisfaction of the claim.' That the Hamilton company [a co-obliger of the defendant, from which the plaintiff had accepted a sum of money by way of compromise, and to which the plaintiff had given a release with a reservation of rights against the defendant] in fact might not have been liable to respond does not affect the adjustment or the application of the payment. Leddy *v.* Barney, 139 Mass. 394, 307. If the reservation by the releasor that it did not relinquish its claim against the defendant corporation prevents the release from being a full discharge, the receipt of a partial payment likewise is to be treated as a partial satisfaction which the plaintiff must apply in reduction of the sum awarded by the decree. Brown *v.* Cambridge, 3 Allen, 474, 476. Wood *v.* Mann, 125 Mass. 319. Hudson *v.* Baker, 185 Mass. 122, 125."

[1] Survivorship in the case of a joint right is illustrated in Anderson *v.* Martindale; 1 East, 497; Trummell *v.* Harrell, 4 Ark. 602; McLeod *v.* Scott, 38 Ark. 72, 76; Supreme Lodge *v.* Portingall, 167 Ill. 291; Vandenhauvel *v.* Storrs, 3 Conn. 203; Indiana, &c. Ry. Co. *v.* Adamson, 114 Ind. 282; Needham *v.* Wright, 140 Ind. 190, 198; McCalla *v.* Rigg, 3 A. K. Marsh. 259; Peters *v.* Davis, 7 Mass. 257; Hedderly *v.* Downs, 31 Minn. 183.

Illustrations of the doctrine of survivorship in the case of a joint liability may be found in Richardson *v.* Horton, 6 Beav. 185; Murphy's Adm. *v.* Branch Bank, 5 Ala. 421; Bundy *v.* Williams, 1 Root, 543; Bulkly *v.* Wright, 2 Root, 10; Ballance *v.* Samuel, 4 Ill. 380; Moore *v.* Rogers, 19 Ill. 347; Eggleston *v.* Buck, 31 Ill. 254; Cummings *v.* People, 50 Ill. 132; Stevens *v.* Catlin, 152 Ill. 56; Clark *v.* Parish, 1 Bibb, 547; New Haven, &c. Co. *v.* Hayden, 119 Mass. 361; Tucker *v.* Utley, 168 Mass. 415; Fuller *v.* Wilbur, 170 Mass. 506; Murray *v.* Mumford, 6 Cow. 441; Bradley *v.* Burwell, 3 Denio, 61, Comins *v.* Pottle, 22 Hun, 287; Wood *v.* Fisk, 63 N. Y. 245; Douglass *v.* Ferris, 138 N. Y. 192, 207; Burgoyne *v.* Ohio Life Ins. Co., 5 Ohio St. 586, Kennedy *v.* Carpenter, 2 Whart. 344, 361.

But the estate of a deceased joint contractor has been made liable in many states by statute. Reed *v.* Summers, 79 Ala. 522, 524; Stevens *v.* Catlin, 152 Ill. 56; Clark *v.* Parish, 1 Bibb, 547; Foster *v.* Hooper, 2 Mass. 572; Martin *v.* Hunt, 1 Allen, 418; New Haven, &c. Co. *v.* Hayden, 119 Mass. 361; Cobb *v.* Fogg, 166 Mass. 466, 476; Suydam *v.* Barber, 18 N. Y. 468; Burgoyne *v.* Ohio Life Ins. Co., 5 Ohio St. 586; Weil *v.* Guerin, 42 Ohio St. 299, 302; Eckert *v.* Myers, 45 Ohio St. 525; Taylor *v.* Taylor, 5 Humph. 110; Chadwick *v.* Hopkins, 4 Wyo. 379.

Benjamin G. Bloss and Jordan Mott, defendant's testator, executed an undertaking as required by section 187 of the old Code. There was default in the undertaking, and the plaintiffs then caused a summons to be issued in this action against Bloss and Mott, which was served on Bloss; before it could be served on Mott, he died. Bloss was afterwards discharged in bankruptcy, and the defendant, as executor of Mott, was substituted, and the action continued against him.

The undertaking is a joint obligation. It is so in terms, and we cannot interpolate into it words of severalty. It could have been made joint and several, but it was not. Bloss and Mott were sureties. They did not assume a principal obligation; they undertook for another; they had no interest except as sureties, and were entitled to all the right of sureties. This case cannot, therefore, be distinguished from Wood *v.* Fisk (63 N. Y., 245), and the defendant, as the representative of Mott, cannot be held. It is a rule of the common law, too long settled to be disturbed, that if a joint obligor dying be a surety, not liable for the debt irrespective of that joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable. Towers *v.* Moore, 2 Vern. 98; Simpson *v.* Vaughan, 2 Atk. 31; Bradley *v.* Burwell, 3 Denio, 61; Richter *v.* Pappenhausen, 42 N. Y. 393; Pickersgill *v.* Tohms, 15 Wall. 140; Getty *v.* Binsse, 49 N. Y. 388; Risley *v.* Brown, 67 id. 160.

However unjust this rule may be in its general operation we have no right to abrogate it. We must enforce it whenever it is applicable, and leave to the law-making power any needed change.

The judgment must be affirmed.

All concur. *Judgment affirmed.*[1]

[1] Compare Richardson *v.* Horton, 6 Beav. 185.

"The sole ground upon which the appellants deny the right of the respondents to share in the assigned estate is that, by the death of the assignor, he being a mere surety, the liability upon his guaranty was extinguished, and they ceased to have any claim upon his estate; and the appellants reply for their contention upon the principle laid down in United States *v.* Price, 9 How. [U. S.] 90; Getty *v.* Binsse, 49 N. Y. 385; Wood *v.* Fisk, 63 id. 245; Risley *v.* Brown, 67 id. 160, and kindred cases.

"It is undoubtedly the rule that in case of a joint obligation of sureties, if one of the obligors die, his representatives are, at law, discharged, and the survivor alone can be sued; but that where the joint obligors were all principal debtors, or received some benefit from the joint obligation, courts of equity have taken jurisdiction in the case of the death of one of the obligors, and enforced the obligation against his representatives. The ground upon which those courts have proceeded is that in conscience the estate of the deceased obligor ought to respond to the obligation; and they have given relief in all cases where, in consequence of a primary liability on the part of the deceased obligor, or of a benefit received by him from the joint obligation, it was morally and equitably just that his estate should be made liable, and unconscionable that it should be discharged. But it has been a rule in courts of equity that where the deceased joint obligor was a mere surety, receiving no benefit from the obligation, and having no interest therein, except as surety, his estate, in case of his death, is discharged from liability. This rule, in such cases, rests upon the ground that the surety is not bound in morals or good conscience to pay, except in accordance with the strict letter of his obligation, and that being discharged therefrom at law, there is no room for the interference of equity upon principles of natural justice by them administered. The reasoning upon which the exemption of the deceased surety's estate from liability is founded, though sanctioned by numerous cases, is not very convincing, and has not always been viewed by judges and jurists with favor.

SAMUEL OSBORN, Jr., and Others *v.* MARTHA'S VINEYARD RAILROAD COMPANY

Supreme Judicial Court of Massachusetts, October 27, 1885–January 11, 1886

[*Reported in* 140 *Massachusetts,* 549]

Gardner, J. This action was originally commenced by Samuel Osborn, Jr., one of the plaintiffs. After the trial of the case Osborn moved to amend his writ by adding, as joint plaintiffs with him, Shubael L. Norton, and Nathaniel M. Jernegan, which motion was allowed. The action then proceeded upon the allegation in their declaration, that the defendant owed the three plaintiffs $600, according to the account annexed, which was for twenty tons of iron rails at $30 per ton, giving credit for $400, paid to Norton and Jernegan.

The first question which arises is whether the contract made by the plaintiffs with the defendant was joint or several. The report finds that the three plaintiffs purchased twenty tons of iron rails in their own names, giving a promissory note, signed by the three, to the vendor therefor. In this purchase, there was no reference to any separate interest of the purchasers in the iron rails, and they became joint owners thereof. They then sold the rails to the defendant, making no reservation of any single interest in any one of the vendors. The defendant promised jointly, not separately, to pay the three plaintiffs the price therefor. This contract was joint, the several payees having therein a joint interest, so that no one could sue for his proportion. When they jointly undertook to sell the rails in one mass to the defendant, they held themselves out to be joint owners, voluntarily assuming that relation to the property sold to the defendant. The contract became a joint contract, the plaintiffs being joint creditors, not several, of the defendant. 2 Chit. Cont. (11th Am. ed.) 1340. The three owners represented, in effect, that they had a common interest in the property, without any dif-

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"It is difficult to perceive why the estate of a surety who was a joint obligor upon, whose credit and responsibility, mainly, the obligee loaned his money, should be discharged by the death of the surety. It would seem that in good conscience and sound morals, and upon principles of natural justice, it should respond, and bear the loss, if any, rather than the obligee who trusted the surety. But it has been quite uniformly held that the mere joint obligation of the deceased surety is not sufficient to create an equity against his estate.

"In all the cases which have come under my observation where it has been held that death discharged the obligation of a joint surety, it appeared that the joint obligor was a mere surety, who received no benefit whatever from the joint obligation. The cases to be found in the books are generally those of joint accommodation indorsers of notes, joint sureties upon official bonds, or upon undertakings given on appeal, or mere sureties upon other instruments of a similar nature." Richardson *v.* Draper, 87 N. Y. 337, 344.

See also Douglass *v.* Ferris, 138 N. Y. 192, 207.

ference in their respective interests and possessions, and that payment was to be made of the entire sum.

The two plaintiffs Norton and Jernegan, in behalf of themselves and of Osborn, settled with the defendant for the amount due, in full payment and satisfaction of their demand, receiving as payment in part money and in part shares of stock in the defendant corporation. The plaintiff Osborn insists that he is not bound by this settlement and that, in the name of the three vendors, he can recover in money that portion of the original indebtedness to which, as between himself and his associates, he was entitled.

The interest of the three plaintiffs in their joint claim against the defendant was such that each had an interest in the entire claim. One of them had not only an interest in the third which might be his share, but also in the two thirds belonging to the others. It has been settled in this action that one cannot maintain an action for his share; the three must join in the suit, because each one has a joint interest in the entire amount due them, and in every part thereof. Osborn is debarred from bringing suit for his third part, because Norton and Jernegan own that third as fully as does Osborn. Each having such an interest in the debt due, one being unable to sue for the whole or his share thereof, it follows that each one, being interested in the entire claim, can settle it with the defendant. Each of the three, by the manner of their dealing with the defendant and with the property, has effectually authorized his partners in the contract to dispose of his interest by payment, settlement, or accord and satisfaction, and to release the defendant from its obligation under the contract. 1 Pars. Cont. 25.

In this case there was no formal release by writing under seal. The plaintiffs Norton and Jernegan, upon the settlement, "gave the defendant a receipted bill of the demand for the price of the rails and interest." The delivery of the shares of stock by the defendant to the plaintiffs, and the payment of the money were accepted in satisfaction and payment of the debt. It was an accord and satisfaction unconditional, actually executed and accepted. This operates to release the defendant from further liability upon the contract. No particular form of words is necessary to constitute a valid release. "Any words which show an evident intention to renounce the claim upon, or to discharge, the debtor are sufficient." 2 Chit. Cont. (11th Am. ed.) 1146. The plaintiff Osborn in his argument has not urged that this settlement was not in effect a release. If this transaction between the parties, if assented to by all who participated in it, was such as to release the defendant from all liability to Norton and Jernegan, of which there is no contention, then it follows that the release of two was the release of all. When there is such a unity of interest as to require a joinder of all the parties interested in a personal action, the release of one is as effectual as the release of all. Austin *v.* Hall, 13 Johns. 286; Decker *v.* Livingston, 15 Johns. 479.

In this case, fraud is not set up, nor is there any suggestion of fraud in the transaction. The settlement was in effect an accord and satisfaction, which operates as a release. Wallace *v.* Kelsall, 7 M. & W. 264, 272.

The settlement made by Norton and Jernegan with the defendant released the defendant from further liability upon its contract with the plaintiffs, and the action cannot be maintained. By the terms of the report there must be *Judgment for the defendant.*[1]

[1] Wallace *v.* Kelsall, 7 M. & W. 264; Husband *v.* Davis, 10 C. B. 645, *acc.* Similarly a release by one joint creditor discharges the right of all. Rawstorne *v.* Gandell, M. & W. 304; Myrick *v.* Dame, 9 Cush. 248; Napier *v.* McLeod, 9 Wend. 120. As to the rule in equity, see Piercy *v.* Fynney, L. R. 12 Eq. 69; Steeds *v.* Steeds, 22 Q. B. D. 537; Powell *v.* Brodhurst, [1901] 2 Ch. 160.

Joint obligations have been much discussed in the civil law. See the French Code Civil, Arts. 1197–1216; the German Bürgerliches Gesetzbuch, §§ 420–432; Windscheid, Pandektenrecht, § 292 *seq.*

CHAPTER IV

THE STATUTE OF FRAUDS[1]

ACT OF 29 CHARLES II CHAPTER 3 (1676)

IV. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreeement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

XVII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of *June* no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

WARNER *v.* TEXAS AND PACIFIC RAILWAY COMPANY

UNITED STATES SUPREME COURT, May 5–November 30, 1896

[*Reported in* 164 *United States,* 418]

THIS was an action brought May 9, 1892, by Warner against the Texas and Pacific Railway Company, a corporation created by the

[1] As the other contracts within the statute and the means of satisfying it are customarily dealt with in connection with other subjects than contracts, cases are here included only upon clause (5) of Section IV.

laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands."

At the trial, the plaintiff, being called as witness in his own behalf, testified that prior to the year 1874 he had been engaged in the lumbering and milling business in Iowa and in Arkansas, and in contemplation of breaking up and consolidating his business, came to Texas, and selected a point, afterwards known as Warner's Switch, as a suitable location, providing he could obtain transportation facilities; that he found at that point an abundance of fine pine timber, and three miles back from the railroad, a stream, known as Big Sandy Creek, peculiarly adapted to floating logs, and lined for many miles above with pine timber; that in 1874 the defendant's agent, after conversing with him about his experience in the lumber business, the capacity of his mill, and the amount of lumber accessible from the proposed location, made an oral contract with him by which it was agreed that if he would furnish the ties and grade the ground for the switch, the defendant would put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it; that the plaintiff immediately graded the ground for the switch, and got out and put down the ties, and the defendant put down the iron rails and established the switch; and that the plaintiff, on the faith of the continuance of transportation facilities at the switch, put up a large saw-mill, bought many thousand acres of land and timber rights and water privileges of Big Sandy Creek, made a tram road three miles long from the switch to the creek, and otherwise expended large sums of money, and sawed and shipped large quantities of lumber, until the defendant, on May 19, 1887, while its road was operated by receivers, tore up the switch and ties, and destroyed his transportation facilities, leaving his lands and other property without any connection with the railroad. His testimony also tended to prove that he had thereby been injured to the amount of more than $50,000, for which the defendant was liable, if the contract sued on was not within the statute of frauds.

On cross-examination, the plaintiff testified that, when he made the contract, he expected to engage in the manufacture of lumber at this place for more than one year, and to stay there, and to have a site for lumber there as long as he lived; and that he told the defendant's agent, in the conversation between them at the time of making

the contract, that there was lumber enough in sight on the railroad to run a mill for ten years, and by moving back to the creek there would be enough to run a mill for twenty years longer.

No other testimony being offered by either party, bearing upon the question whether the contract sued on was within the statute of frauds, the Circuit Court, against the plaintiff's objection and exception, ruled that the contract was within the statute, instructed the jury to find a verdict for the defendant, and rendered judgment thereon, which was affirmed by the Circuit Court of Appeals, upon the ground that the contract was within the statute of frauds, as one not to be performed within a year. 13 U. S. App. 236. The plaintiff sued out this writ of error.

Mr. *Horace Chilton,* for plaintiff in error.

Mr. *John F. Dillon,* for defendant in error. Mr. *Winslow S. Pierce* and Mr. *David D. Duncan* were on his brief.

Mr. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The statute of frauds of the State of Texas, reënacting in this particular the English statute of 29 Car. II. c. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." Texas Stat. January 18, 1840; 1 Paschal's Digest (4th ed.), art. 3875, Rev. Stat. of 1879, art. 2464; Bason *v.* Hughart, 2 Tex. 476, 480.

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several States.

In the earliest reported case in England upon this clause of the statute, regard seems to have been had to the time of actual performance, in deciding that an oral agreement that if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him fifty guineas, was not within the statute; Lord Holt saying: "Though the promise depends upon a contingent, the which may not happen in a long time, yet if the contingent happen within a year, the action shall be maintainable, and is not within the statute." Francam *v.* Foster (1692), Skinner, 326; s. c. Holt, 25.

A year later, another case before Lord Holt presented the question whether the words "agreement not to be performed within one year" should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the

one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised for one guinea paid, to pay the plaintiff so many at a day of his marriage; and the marriage did not happen within the year. The case was considered by all the judges. Lord Holt "was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement; and laid down this rule: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary." Peter *v.* Compton (1693), Skinner, 353; s. c. Holt, 326; s. c. cited by Lord Holt in Smith *v.* Westall 1 Ld. Raym. 316, 317; Anon., Comyns, 49, 50; Comberbach, 463.

Accordingly about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said, that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year." Anon., 1 Salk. 280.

Again, in a case in the King's Bench in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. Lord Mansfield said that the law was settled by the earlier cases. Mr. Justice Denison said: "The statute of frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specifically so agreed. A *contingency* is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only *may* be performed within the year; and the act cannot be extended further than the words of it." And Mr. Justice Wilmot said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. Fenton *v.* Emblers, 3 Burrow, 1278; s. c. 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence,

that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several States of the Union, in reënacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. Tucker *v.* Oxley, 5 Cranch, 34, 42; Pennock *v.* Dialogue, 2 Pet. 1, 18; Macdonald *v.* Hovey, 110 U. S. 619, 628. And the rule established in England by those decisions has ever since been generally recognized in England and America, although it may in a few instances have been warped or misapplied.

The decision in Boydell *v.* Drummond (1809), 11 East, 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case, the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays, in eighteen numbers containing four plates each, at the price of three guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number at least should be published annually, and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare subscribers, their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of Lord Ellenborough and Justices Grose, La Blanc, and Bayley, the contract, according to the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

In Wells *v.* Horton (1826), 4 Bing. 40; s. c. 12 J. B. Moore, 177, it was held to be settled by the earlier authorities that an agreement

by which a debtor, in consideration of his creditors agreeing to forbear to sue him during his lifetime, promised that his executor should pay the amount of the debt, was not within the statute and Chief Justice Best said: "The present case is clearly distinguishable from Boydell *v.* Drummond, where upon the face of the agreement it appeared that the contract was not to be executed within a year." [1]

In Souch *v.* Strawbridge (1846), 2 C. B. 808, a contract to support a child, for a guinea a month, as long as the child's father should think proper, was held not to be within the statute, which, as Chief Justice Tindal said, "speaks of 'any agreement that is not to be performed within the space of one year from the making thereof'; pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of Boydell *v.* Drummond, the rule to be extracted from which is, that, where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

"In Murphy *v.* O'Sullivan (1866), 11 Irish Jurist (N. S.) 111, the Court of Exchequer Chamber in Ireland, in a series of careful opinions by Mr. Justice O'Hagan (afterwards Lord Chancellor of Ireland), Baron Fitzgerald, Chief Baron Pigot, and Chief Justice Monahan, reviewing the English cases, held that under the Irish statute of frauds of 7 Will. III. c. 12 (which followed in this respect the words of the English statute), an agreement to maintain and clothe a man during his life was not required to be in writing.

In the recent case of McGregor *v.* McGregor, 21 Q. B. D. 424 (1888), the English Court of Appeal held that a lawful agreement made between husband and wife, in compromise of legal proceedings, by which they agreed to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and she agreeing to maintain herself and her children, and to indemnify him against any debts contracted by her, was not within the statute. Lord Esher, M. R., thought the true doctrine on the subject was that laid down

[1] Promises which by their terms extend over the life of the promisor or promisee are not within the statute. Hill *v.* Jamieson, 16 Ind. 125; Bell *v.* Hewitt's Ex., 24 Ind. 280; Harper *v.* Harper, 57 Ind. 547; Welz *v.* Rhodius, 87 Ind. 1; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109; Atchison, &c. R. R. Co. *v.* English, 38 Kan. 110; Howard *v.* Burgen, 4 Dana, 137; Bull *v.* McCrea, 8 B. Mon. 422; Myles *v.* Myles, 6 Bush, 237; Stowers *v.* Hollis, 83 Ky. 544; Hutchison, 46 Me. 154; Worthy *v.* Jones, 11 Gray, 168; Carr *v.* McCarthy, 70 Mich. 258; McCormick *v.* Drummett, 9 Neb. 384; Blanding *v.* Sargent, 33 N. H. 239; Dresser *v.* Dresser, 35 Barb. 573; Thorp *v.* Stewart, 44 Hun, 232; Richardson *v.* Pierce, 7 R. I. 330; East Line Co. *v.* Scott, 72 Tex. 70; Blanchard *v.* Weeks, 34 Vt. 589; Thomas *v.* Armstrong, 86 Va. 323; Heath *v.* Heath, 31 Wis. 223. But see *contra*, Vose *v.* Strong, 45 Ill. App. 98, aff'd. 144 Ill. 108; Deaton *v.* Tennessee Coal Co., 12 Heisk. 650.

Similarly contracts to be performed at the death of a person are not within the statute. Frost *v.* Tarr, 53 Ind. 390; Riddle *v.* Backus, 38 Ia. 81; McDaniel *v.* Hutcherson, 136 Ky. 412; Sword *v.* Keith, 31 Mich. 247; Jilson *v.* Gilbert, 26 Wis. 637.

by Chief Justice Tindal in the passage above quoted from Souch *v.* Strawbridge. Lord Justice Lindley said: "The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that if the contract can by possibility be performed within the year, the statute does not apply." Lord Justice Bowen said: "There has been a decision which for two hundred years has been accepted as the leading case on the subject. In Peter *v.* Compton, it was held that 'an agreement that is not to be performed within the space of a year from the making thereof' means, in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year." And each of the three judges took occasion to express approval of the decision in Murphy *v.* O'Sullivan, above cited, and to disapprove the opposing decision of Hawkins, J., in Davey *v.* Shannon, 4 Ex. D. 81.

The cases on this subject in the courts of the several States are generally in accord with the English cases above cited. They are so numerous, and have been so fully collected in Browne on the Statute of Frauds (5th ed.), c. 13, that we shall refer to but few of them, other than those cited by counsel in the case at bar.

In Peters *v.* Westborough, 19 Pick. 364, an agreement to support a girl of twelve years old until she was eighteen was held not to be within the statute.[1] Mr. Justice Wilde, in delivering judgment, after quoting Peter *v.* Compton, Fenton *v.* Emblers, and Boydell *v.* Drummond, above cited, said: "From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend upon any contingency. And this, we think, is the clear meaning of the statute. In the present case, the performance of the plaintiff's agreement with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year."

In many other States, agreements to support a person for life have been held not to be within the statute. Browne on Statute of Frauds, § 276. The decision of the Supreme Court of Tennessee in

[1] Wooldridge *v.* Stern, 42 Fed. Rep. 311; White *v.* Murtland, 71 Ill. 250; McKinney *v.* McCloskey, 8 Daly, 368, 76 N. Y. 594; Taylor *v.* Deseve, 81 Tex. 246, *acc.* See also Wiggins *v.* Keizer, 6 Ind. 252; Hollis *v.* Stowers, 83 Ky. 544; Ellicott *v.* Turner, 4 Md. 476; McLees *v.* Hale, 10 Wend. 426; Shahan *v.* Swan, 48 Ohio St. 25. Goodrich *v.* Johnson, 66 Ind. 258; Bristol *v.* Sutton, 115 Mich. 365; Shute *v.* Dorr, 5 Wend. 204; Jones *v.* Hay, 52 Barb. 501, *contra.*

Deaton v. Tennessee Coal Co., 12 Heisk. 650, cited by the defendant in error, is opposed to the weight of authority.

In Roberts v. Rockbottom Co., 7 Met. 46, Chief Justice Shaw declared the settled rule to be that "when the contract may, by its terms, be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year"; and stated the case then before the court as follows: "The contract between the plaintiff and the company was that they should employ him, and that he should serve them, upon the terms agreed on, five years, or so long as Leforest should continue their agent. This is a contract which might have been fully performed within the year. The legal effect is the same as if it were expressed as an agreement to serve the company so long as Leforest should continue to be their agent, not exceeding five years; though the latter expression shows a little more clearly that the contract might end within a year, if Leforest should quit the agency within that time."

In Blanding v. Sargent, 33 N. H. 239, the court stated the rule, as established by the authorities elsewhere, and therefore properly to be considered as adopted by the legislature of New Hampshire when re-enacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed, that is, incapable in any event of being performed, within one year from the time it is made"; and that "if by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary"; and therefore that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the statute, because "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other States are to the same effect. Browne on Statute of Frauds, § 277.

In Hinckley v. Southgate, 11 Vt. 428, cited by the defendant in error, the contract held to be within the statute of frauds was in express terms to carry on a mill for a year from a future day; and the suggestion in the opinion that if the time of performance depends upon a contingency, the test is whether the contingency will probably happen, or may reasonably be expected to happen, within the year, was not necessary to the decision of the case, and cannot stand with the other authorities. Browne on Statute of Frauds, § 279.

In Linscott v. McIntire, 15 Maine, 201, also cited by the defendant in error, an agreement to sell a farm at the best advantage, and to

pay to the plaintiff any sum remaining after refunding the defendant's advances and paying him for his trouble, was held not to be within the statute of frauds; Chief Justice Weston saying: "The sale did not happen to be made until a year had expired; but it might have taken place at an earlier period, and there is nothing in the case from which it appears that, in the contemplation of the parties at the time, it was to be delayed beyond a year. This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within the space of a year. And it has been held to be no objection that it depended on a contingency, which might not and did not happen, until after that time."

In Herrin *v.* Butters, 20 Maine, 119, likewise cited by the defendant in error, the contract held to be within the statute could not possibly have been perfomed within the year, for it was to clear eleven acres in three years, one acre to be seeded down the present spring, one acre the next spring, and one acre the spring following, and to receive in consideration thereof all the proceeds of the land, except the two acres first seeded down.

In Broadwell *v.* Getman, 2 Denio, 87, the Supreme Court of New York stated the rule thus: "Agreements which may be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be, carried into full execution until after the expiration of that time." The contract there sued on was an agreement made in January, 1841, by which the defendant agreed to clear a piece of woodland for the plaintiff, and to partly make a fence at one end of it, which the plaintiff was to complete, the whole to be done by the spring of 1842; and the defendant was to have for his compensation the wood and timber, except that used for the fence, and also the crop to be put in by him in the spring of 1842. The court well said: "As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute."

In Pitkin *v.* Long Island Railroad, 2 Barb. Ch. 221, cited by the defendant in error, a bill in equity to compel a railroad company to perform an agreement to maintain a permanent turnout track and stopping place for its freight trains and passenger cars in the neighborhood of the plaintiff's property, was dismissed by Chancellor Walworth upon several grounds, the last of which was that, as a mere executory agreement to continue to stop with its cars at that place, "as a permanent arrangement," the agreement was within the statute of frauds, because from its nature and terms it was not to be performed by the company within one year from the making thereof.

In Kent *v.* Kent, 62 N. Y. 560, an agreement by which a father, in consideration of his son's agreeing to work for him upon his farm, without specifying any time for the service, agreed that the value of the work should be paid out of his estate after his death, which did not happen until twenty years after the son ceased work, was not within the statute. Judge Allen, delivering the judgment of the Court of Appeals, said: "The statute, as interpreted by courts, does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute."

In Saunders *v.* Kasterbine, 6 B. Monroe, 17, cited by the defendant in error, the contract proved, as stated in the opinion of the court, was to execute a bill of sale of a slave when the purchaser had paid the price of $400, in monthly instalments of from $4 to $8 each, which would necessarily postpone performance, by either party, beyond the year.

In Railway Co. *v.* Whitley, 54 Ark. 199, a contract by which a railway company, in consideration of being permitted to build its road over a man's land, agreed to construct and maintain cattle guards on each side of the road, was held not to be within the statute, because it was contingent upon the continuance of the use of the land for a railroad, which might have ceased within a year. And a like decision was made in Sweet *v.* Desha Lumber Co., 56 Ark., 629, upon facts almost exactly like those in the case at bar.

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in Packet Co. *v.* Sickles, 5 Wall. 580, which arose in the District of Columbia under the statute of 29 Car. II. c. 3, § 4, in force in the State of Maryland and in the District of Columbia. Alexander's British Statutes in Maryland, 509; Ellicott *v.* Peterson, 13 Md. 476, 487; Comp. Stat. D. C., c. 23, § 7.

That was an action upon an oral contract by which a steamboat company agreed to attach a patented contrivance, known as the Sickles cut-off, to one of its steamboats, and if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay to the plaintiffs weekly, for the use of the cut-off, three fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract, the patent had twelve years to run. The court, in an opinion delivered by Mr. Justice Nelson, held the contract to be within the statute; and said: "The substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals through-

out the period of twelve years, if the boat to which the cut-off is attached should last so long." "It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time." 5 Wall. 594–596. And reference was made to Birche *v.* Liverpool, 9 B. & C. 392, and Dobson *v.* Collis, 1 H. & N. 81, in each of which the agreement was for the hire of a thing, or of a person, for a term specified of more than a year, determinable by notice within the year, and therefore within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In Packet Co. *v.* Sickles, it appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but was defeasible by an event which might or might not happen within one year. It may well be doubted whether that view can be reconciled with the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the fore part of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." 5 Wall. 581, 594; s. c. (Lawyer's Cop. Pub. Co. ed.) bk. 18, pp. 552, 554. The terms "during the continuance of" and "last so long" would seem to be precisely equivalent; and the full performance of the contract to be limited alike by the life of the patent, and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1875, this court, speaking by Mr. Justice Miller, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease thereof and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statute, because all this might have been done within a year; and in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the State had agreed to complete by September 1, 1871, was not within the statute, because the contractor,

by pushing the work, might have fully completed it before November, 1870. McPherson *v.* Cox, 96 U. S. 404, 416, 417; Walker *v.* Johnson, 96 U. S. 424, 427.

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the Supreme Court of the State are in accord with the current of decisions elsewhere.

In Thouvenin *v.* Lea, 26 Tex. 612, the court said: "An agreement which may or may not be performed within a year is not required by the statute of frauds to be in writing; it must appear from the agreement itself that it is not to be performed within a year." In that case, the owner of land orally agreed to sell it for a certain price, payable in five years; the purchaser agreed to go into possession and make improvements; and the seller agreed, if there was a failure to complete the contract, to pay for the improvements. The agreement to pay for the improvements was held not to be within the statute; the court saying: "There is nothing from which it can be inferred that the failure to complete the contract (by reducing it to writing, for instance, as was stipulated should be done) or its abandonment, might not occur within a year from the time it was consummated. The purchaser, it is true, was entitled by the agreement to a credit of five years for the payment of the purchase money, if the contract had been reduced to writing. But appellant might have sold to another, or the contract might have been abandoned by the purchaser, at any time; and upon this alone depended appellant's liability for the improvements." See also Thomas *v.* Hammond, 47 Tex. 42.

In the very recent case of Weatherford, &c., Railway *v.* Wood, 88 Tex. 191, it was held that an oral agreement by a railroad company to issue to one Wood annually a pass over its road for himself and his family, and to stop its trains at his house, for ten years, was not within the statute. The court, after reviewing many of the authorities, said: "It seems to be well settled that where there is a contingency expressed upon the face of the contract, or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not within the statute, though it be clear that it cannot be performed within a year except in the event the contingency happens." "If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contemplated its happening, whether they mention it in the contract or not. The statute only applies to contracts *not 'to be performed* within the space of one year from the making thereof.' If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute; and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency

in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and his family. He could not transfer it. In case of his death within the year, the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member, or all of them, within the year. If the agreement had been to give to Wood a pass for life, it would, under the above authorities, not have been within the statute; and we can see no good reason for holding it to be within the statute because his right could not have extended beyond ten years. The happening of the contingency of the death of himself and family within a year would have performed the contract in one case as certainly as in the other." 88 Tex. 195, 196.

In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a saw-mill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties; nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it"; and no contingency which should put an end to the performance of the contract,

other than his not needing the switch for the purpose of his business, appears to have been in the mouth, or in the mind, of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The suggestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in real estate, and as such within the statute, overlooks the difference in real estate, and as such within the statutes in this particular. The existing statutes of Texas, while they substantially follow the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to reënact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to, or out of," lands or tenements, and, in the other clause, "or any interest in or concerning them." Stat. 29 Car. II. c. 3, §§ 1, 4; Texas Rev. Stat. of 1879, arts. 548, 2464; 1 Paschal's Digest, arts. 997, 3875; James *v.* Fulcrod, 5 Tex. 512, 516; Stuart *v.* Baker, 17 Tex. 417, 420; Anderson *v.* Powers, 59 Tex. 213.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.[1]

[1] Heflin *v.* Milton, 69 Ala. 354; Graham *v.* Railroad, 111 Ark. 598; Orland *v.* Finnell, 133 Cal. 475; Clark *v.* Pendleton, 20 Conn. 495; Sarles *v.* Sharlow, 5 Dak. 100; White *v.* Murtland, 71 Ill. 250; Straughan *v.* Indianapolis, &c. R. R. Co., 38 Ind. 185; Sutphen *v.* Sutphen, 30 Kan. 510; Louisville, &c. R. R. Co. *v.* Offutt, 99 Ky. 427; Story *v.* Story (Ky.), 61 S. W. Rep. 279, 62 S. W. Rep. 865; Walker *v.* Metropolitan Ins. Co., 56 Me. 371; Baltimore Breweries Co. *v.* Callahan, 82 Md. 106; Carnig *v.* Carr, 167 Mass. 544; Wiebeler *v.* Milwaukee Ins. Co., 30 Minn. 464; Harrington *v.* Kansas City R. R. Co., 60 Mo. App. 223; Boggs *v.* Pacific Laundry Co., 86 Mo. App. 616; Powder River Co. *v.* Lamb, 38 Neb. 339; Gault *v.* Brown, 48 N. H. 183; Plimpton *v.* Curtiss, 15 Wend. 336; Trustees *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305; Blake *v.* Voist, 134 N. Y. 69; Randall *v.* Turner, 17 Ohio St. 262; Blakeney *v.* Goode, 30 Ohio St. 350; Jones *v.* Pouch, 41 Ohio St. 146; Hodges *v.* Richmond Mfg. Co., 9 R. I. 482; Seddon *v.* Rosenbaum, 85 Va. 928, *acc.*

Dobson *v.* Collis, 1 H. & N. 81; Meyer *v.* Roberts, 46 Ark. 80; Wilson *v.* Ray, 13 Ind. 1; Goodrich *v.* Johnson, 66 Ind. 258; Carney *v.* Mosher, 97 Mich. 554; Mallett *v.* Lewis, 61 Miss. 105; Biest *v.* Ver Steeg Shoe Co., 70 S. W. Rep. 1081 (Mo. App.); Shute *v.* Dorr, 5 Wend. 204; Day *v.* New York Central R. R. Co., 51 N. Y. 583, 89 N. Y. 614; Izard *v.* Middleton, 1 Desaus, 116; Jones *v.* McMichael, 12 Rich. L. 176;

JOHN DOYLE *v.* JOHN DIXON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1867

[*Reported in* 97 *Massachusetts,* 208]

CONTRACT for breach of an agreement by the defendant not to go into the grocery business in Chicopee for five years.

At the new trial in the superior court, before ROCKWELL, J., after the decision reported 12 Allen, 576, it appeared in evidence that the defendant was a grocer at Chicopee, and that on November 19, 1864, he and the plaintiff entered into an agreement and signed a memorandum thereof in writing, by which it was provided that on December 1 ensuing the defendant would transfer to the plaintiff his stock of goods, and would lease to the plaintiff his shop for five years, at an agreed rent, receiving from the plaintiff the market value of the stock, and five hundred dollars besides as bonus, and that if either party should "back out" he should forfeit to the other two hundred dollars.

It appeared also that on November 21 the plaintiff went to the defendant's shop and said that some of his family were sick at North Brookfield and he wanted to go home, and would like to take the lease at once and "settle up the whole business," and the defendant agreed to do so, and proposed that they should go to an attorney's office for the lease to be drawn. One witness testified that, during this conversation, "the defendant said he had some flour coming, and asked if the plaintiff would take it of him; and the plaintiff said he did not want it, that he had not much capital and it would not be convenient to take it; and the defendant said, Will you give me the privilege of selling it? and the plaintiff said, Yes; and the defendant thanked him for it and said he would not trouble him by going into business in five years." The plaintiff himself testified that the defendant said, "I have a lot of flour coming; if you don't want to buy it, will you give me the privilege to sell it?" that he replied, "Yes;" and that the defendant then said, "If you'll let me sell the flour it is all I want, and I shall not trouble you in the grocery business in Chicopee in five years."

It appeared further that the parties then went to an attorney's office, and that, while the lease was in preparation, the plaintiff asked if it would not be well to mention in it that the defendant was not to go into the business in Chicopee for five years, and the defendant said it would be foolish, and the attorney said that there was

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Deaton *v.* Tennessee Coal Co., 12 Heisk. 650, *contra.* See also Buhl *v.* Stephens, 84 Fed. Rep. 922; Swift *v.* Swift, 46 Cal. 266; Butler *v.* Shehan, 61 Ill. App. 561.

In a few states contracts to marry at a time more than a year in the future have been held not within the statute; but the contrary view is better supported. See 1 Williston, Contracts, § 501.

no need of it; that the parties agreed that the lease thus drawn should be deposited with the parish priest; and that a day or two before December 1 the plaintiff paid the bonus of five hundred dollars, and on or before that day all the other stipulations of the memorandum signed on November 19 were fully performed by the parties respectively.

It was also in evidence that on May 15, 1866, the defendant did enter into the grocery business in Chicopee, and continued in it to the time of the commencement of this action on August 15 following.

The plaintiff claimed his right of action only upon and by virtue of the agreement of November 21; whereupon the defendant requested the judge to rule that he could not recover upon an oral agreement not to go into the grocery business in Chicopee within five years, because such agreement was not to be performed within one year from the making thereof and was within the statute of frauds; but the judge ruled the contrary.

The defendant alleged exceptions.

A. L. Soule, for the defendant.

G. M. Stearns, for the plaintiff.

GRAY, J.[1] It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters *v.* Westborough, 19 Pick. 364, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill *v.* Hooper, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly

[1] Only so much of the case is printed as relates to the Statute of Frauds.

held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. Lyon *v.* King, 11 Met. 411; Worthy *v.* Jones, 11 Gray, 168. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds.

Exceptions overruled.[1]

CHERRY *v.* HEMING & NEEDHAM

IN THE EXCHEQUER, December 5, 1849

[*Reported in* 4 *Exchequer,* 63]

THIS was an action of covenant on an indenture, dated the 31st of March, 1836, whereby the plaintiff assigned certain letters patent to the defendants, who covenanted to pay the plaintiff 840*l.*, by instalments extending over several years, subject to a proviso, that if, at the expiration of twelve months from the date of the indenture, the defendants should not approve of the working of the patent, and should give notice of their disapprobation, and of their intention to sell the patent, then the payment of the first instalment should be suspended; and if, having given such notice, the defendants should within six months sell the patent, then the covenant should cease and determine. The defendants pleaded *non est factum.*

At the trial, before PLATT, B., at the Middlesex Sittings after Easter Term, 1849, it appeared that the defendant Needham had executed the deed, and there was the signature to it of all the parties, except that of the defendant Heming. There was, however, a seal at the foot of the deed for each party, being the seal ordinarily used in the office of the plaintiff's attorney who prepared the deed, and

[1] McGirr *v.* Campbell, 71 N. Y. App. D. 83; Witter *v.* Gottschalk, 5 Ohio Dec. 77, 25 Ohio St. 76, *contra.* Compare O'Neal *v.* Hines, 145 Ind. 32.

who had attested the execution of the defendant Needham. The deed was produced out of the custody of Heming. The defendants had endeavored to work the patent, but, being dissatisfied with it, sent the following notice in the handwriting of the defendant Heming, and signed by both the defendants: —

It was objected, that there was no evidence of the execution of the deed by the defendant Heming; but the learned Judge ruled that there was evidence for the jury. It was also objected, that this was a contract within the 4th section of the Statute of Frauds, 29 Car. II. c. 2, and ought, therefore, to have been signed by the defendant Heming. His Lordship was of opinion that a deed was not within the meaning of that statute, and a verdict was found for the plaintiff.

Parke, B. The rule must be discharged. With respect to the question, whether this is an instrument within the Statute of Frauds, I think that Donellan *v.* Read is an answer; and, in my opinion, that case was rightly decided. The question turns upon the construction of the words "not to be performed;" and in Donellan *v.* Read the Court considered that those words meant, not to be performed on either side, and did not include cases where the contract was performed on the one side. That was certainly in accordance with the opinion expressed by Lord Tenterden in Bracegirdle *v.* Heald. If Donellan *v.* Read had been simply a decision on a doubtful point, we ought to be bound by it, unless manifestly wrong; and the learned observations of Mr. Smith are not sufficient to induce me to say that it was wrongly decided. The case of Peter *v.* Compton, which he relies on, does not support his view. All that can be said of that case is, that, there being two answers to the Statute of Frauds, Lord Holt gives one which is satisfactory, namely, that the agreement might have been performed within the year. It is unnecessary to give an opinion on the other points; but I must own that I think a deed is not within the Statute of Frauds, because, in my opinion, that statute was never meant to apply to the most solemn instrument which the law recognizes. I also think that the notice which refers to the deed would, if it were necessary to have recourse to it, be a sufficient note or memorandum within the statute. I do not mean to be concluded by this expression of my opinion on the two latter points, but only to state my present impression.

Alderson, B. — I also think that Donellan v. Read is good law; but even if it were not, this case would not require its assistance, because, this being the case of a deed, it must be taken to have been sealed by the parties in due form, and the statute does not apply to such instruments, but only to parol agreements.

Rolfe, B. I am strongly inclined to think that the statute does not extend to deeds, because its requirements would be satisfied by the parties putting their mark to the writing. The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signa-

ture rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark.

PLATT, B., concurred. *Rule discharged.*[1]

DIETRICH ET AL *v.* HOEFELMEIR

MICHIGAN SUPREME COURT, July 19, 1901

[*Reported in* 128 *Michigan,* 145]

MOORE, J. This is an action of trover brought to recover the value of 40 sheep claimed to have been converted by the defendant to his own use on the 6th day of January, 1900. The declaration was in the usual form of declarations in trover. The plea was the general issue, with notice of a contract between the parties by which the defendant took 20 sheep from the plaintiffs, to double in four years from the 6th day of January, 1896, and also a notice of tender. Some time in the month of December, 1895, one of the plaintiffs met the defendant at his place of business in Ravenna, when the defendant wanted to know if the plaintiff had any sheep to sell. Plaintiff Leo Dietrich said he had no sheep to sell, but would let defendant have 20 sheep on shares, to double in four years, provided it was satisfactory to his brother Jacob. Soon after that date, and on the 6th day of January, 1896, the defendant went to the place of the plaintiffs to get the sheep, when it was agreed between the plaintiffs and defendant as follows: —

"Plaintiffs agreed to let the defendant have 20 sheep, all ewes, and all with lamb, all good size and all good grade; the defendant to take said sheep to double in four years; and return at the end of four years 40 ewe sheep, all to be with lamb, and the same grade or quality of sheep, to be delivered by the defendant to the plaintiffs at his (defendant's) farm."

The sheep delivered were from 2 to 6 years old. Defendant was to return sheep not younger than 2 nor more than 6 years old. A demand was made upon him for the sheep. Upon his refusal to deliver them, this suit was brought.

At the conclusion of the testimony for the plaintiffs, counsel for defendant moved the court "to direct a verdict in favor of the defendant —

[1] Compare Reeve *v.* Jennings, [1910] 2 K. B. 522.

"*First,* upon the ground that the contract testified to by the witnesses for the plaintiffs is a verbal contract, and not one to be performed within a year by the defendant, and therefore within the statute of frauds, so called;

"*Second,* upon the ground that the transaction on January 6th and prior thereto between these parties concerning these sheep, as testified to by the plaintiffs' witnesses, was a sale of the sheep, and not a bailment, and that the title passed to the defendant, and the plaintiffs have no title or interest in the specific sheep for which they seek to recover in this action of trover; and,

"*Third* (which is covered in that, perhaps), that an action of trover will not lie. If any action would lie, it would be an action of *assumpsit.*"

The trial judge was of the opinion that the contract was within the statute of frauds and was absolutely void, and directed a verdict for the defendant. The case is brought here by writ of error.

Counsel, in their brief, say:

"The position of defendant may be stated as follows:—

"1. The contract on the part of defendant to deliver to plaintiffs 40 sheep at the end of four years was not in writing, and by its terms was not to be performed within one year, and therefore was within the statute of frauds. The contract on the part of the plaintiffs to deliver to defendant 20 sheep was to be performed presently, and was fully executed, and therefore was not within the statute of frauds.

"2. The transaction constituted a sale, and not a bailment, of the sheep by plaintiffs to the defendant.

"3. The plaintiffs have mistaken the form of their action. While they might have recovered upon the appropriate common counts in an action of *assumpsit,* they cannot recover in the present action of trover."

We think this position is not tenable. Were it not for the statute of frauds, this contract would not be void; and, were it completely executed, it would be taken out of the statute, so that neither party could question its validity. Browne, Stat. Frauds (5th ed.), § 116. The plaintiffs are not invoking the aid of the statute to avoid the contract. That is done by defendant, who has agreed by parol to do something which he now refuses to do because the contract was not made in writing, after the other parties have performed their agreement. The defendant cannot separate an agreement, which all the parties regarded as an entire one, into two parts, and say that one of these parts was performed within a year, and therefore makes a complete contract, by which defendant has obtained title to the property, while, as to the other part of the contract, by which defendant was to return twice the number of the sheep which he had received, that as that agreement was not to be performed within a year, and has never in fact been performed, it is void because not in writing, and therefore he will not perform it. To allow this con-

tention would be to permit the making of a contract never contemplated by the parties.

Under the provisions of subdivision 1, § 9515, 3 Comp. Laws, the contract the parties undertook to make was void because it could not be performed within a year, and was not in writing. The circuit judge was right in declaring it to be absolutely void. Scott *v.* Bush, 26 Mich. 418, 421 (12 Am. Rep. 311); Kelly *v.* Kelly, 54 Mich. 30, 48 (19 N. W. 580); Raub *v.* Smith, 61 Mich. 543, 547 (28 N. W. 676, 1 Am. St. Rep. 619); Wardell *v.* Williams, 62 Mich. 50, 62 (28 N. W. 796, 4 Am. St. Rep. 814); Winner *v.* Williams, 62 Mich. 363, 366 (28 N. W. 904). If this is so, it did not convey the title of the sheep to the defendant, but the title remained with the plaintiffs. After the defendant has got possession of the sheep belonging to plaintiffs by reason of a contract made void by the statute, he cannot invoke the aid of the statute to defeat the title of the plaintiffs, and say the same contract confers upon himself title to the property. The law is not so unfair and unjust as that would be. The title to the sheep, then, remaining in the plaintiffs, and the defendant, without the consent of the plaintiffs, having sold them, and having, upon demand made, refused to return them, the plaintiffs were entitled to maintain this action.

Judgment reversed and new trial ordered.

The other justices concurred.[1]

SMITH *v.* GOLD COAST AND ASHANTI EXPLORERS, Ltd.

In the King's Bench Division, January 15, 1903

[*Reported in* [1903] 1 *King's Bench,* 285]

Lord Alverstone, C. J. We are of opinion that there must be a new trial in this case. The Common Serjeant directed the jury to find a verdict for the defendants, because, in his opinion, the contract sued upon was one which was not to be performed within the space of one year from the making thereof, and was therefore within Sec. 4 of the Statute of Frauds. The contract set up by the plaintiff was entered into on December 6, 1901, and by it he was engaged

[1] Berry *v.* Graddy, 1 Met. (Ky.) 553; Marcy *v.* Marcy, 9 Allen, 8; Kelley *v.* Thompson, 175 Mass. 427; Buckley *v.* Buckley, 9 Nev. 373; Bartlett *v.* Wheeler, 44 Barb. 162; Broadwell *v.* Getman, 2 Denio, 87; Parks *v.* Francis, 50 Vt. 626, *acc.* See also Reinheimer *v.* Carter, 31 Ohio St. 579, 587.

Wehner *v.* Bauer, 160 Fed. 240; Manning *v.* Pippen, 95 Ala. 537, 541; Johnson *v.* Watson, 1 Ga. 348; Fraser *v.* Gates, 118 Ill. 99, 112; Haugh *v.* Blythe, 20 Ind. 24; Piper *v.* Fosher, 121 Ind. 407; Smalley *v.* Greene, 52 Ia. 241; Dant *v.* Head, 90 Ky. 255; Blanton *v.* Knox, 3 Mo. 342; Bless *v.* Jenkins, 129 Mo. 647; Marks *v.* Davis, 72 Mo. App. 557; Blanding *v.* Sargent, 33 N. H. 239; Little *v.* Little, 36 N. H. 224, Perkins *v.* Clay, 54 N. H. 518; Matter of Chamberlain, 146 N. Y. App. D. 583; Durfee *v.* O'Brien, 16 R. I. 213; Gee *v.* Hicks, 1 Rich. Eq. 5; Reed *v.* Gold, 102 Va. 37; McCellan *v.* Sanford, 26 Wis. 595; Washburn *v.* Dosch, 68 Wis. 436; Phillips *v.* Holland, 149 Wis. 524, *contra.* See also Sheehy *v.* Adarene, 41 Vt. 541.

by the defendants to act as their solicitor for a year certain from December 7, 1901. The question is whether that is a contract within Sec. 4 of the Statute of Frauds.

In one sense the contract may be said to be one which is not to be performed within the space of one year from the date when it was made. It depends upon whether the period of service is to exclude or include the day next after that on which the contract was entered into. It is contended for the defendants that a year's service "from" December 7, 1901, would commence on December 8 — that is to say, that the year would exclude December 7, 1901, and would include December 7, 1902. If that is the contract, then it is clear, on the authority of Britain *v.* Rossiter[1] that the contract is within the statute, for it was there decided that where the service is to commence on the second day after that on which the contract is made, the contract is one which is not to be performed within a year. But if the contract in this case was for a year's service commencing on December 7, 1901 — that is, on the day next after that on which the contract was made — and terminating on December 6, 1902, there is authority for holding that such a contract is not within the statute. In Cawthorne *v.* Cordrey[2] it had been ruled at the trial that an agreement made on a Sunday for a year's service to commence on the Monday was not within the statute. In the course of the argument on a rule for a new trial Willes J. said: "If a builder undertakes to build a house within a year, that means a year from the next day"; and Byles J. said: "If you adopt the reasonable rule which excludes fractions of a day, taking the receipt to define the duration of the contract, there would be only three hundred and sixty-five days." These dicta are an expression of opinion in favour of the view that the statute does not apply where the service is to commence on the day next after the agreement. Then Brett, L. J., in Britain *v.* Rossiter[3] referring to Cawthorne *v.* Cordrey[4] said: "There was however a dictum of Willes J., which seems to be supported by the opinion of Byles J.; these are great authorities; and that dictum seems to have been that if a contract is made on a day, say Monday, for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract; but that inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the service to be performed within 365 days after that, the law did not count that half-day of the Monday, and therefore the contract was to be performed within 365 days after it was made, and that was within a year. This view was founded upon a fiction, namely, that the law does not take notice of part of a day. I am not prepared to say that under like circumstances one might not follow that dictum, and carry it to the

[1] 11 Q. B. D. 123.
[2] 13 C. B. (N. S.) 406.
[3] 11 Q. B. D. 123.
[4] 13 C. B. (N. S.) 406.

length of a decision. It is not necessary to say so here, because the case has not arisen." The case has now arisen for our decision, and I cannot regard that passage from Brett, L. J.'s judgment as being intended to express disapproval of the dicta in Cawthorne *v.* Cordrey.[1] On the contrary, I think that these cases shew that a contract for a year's service to commence on the day next after the day on which the contract was made is not an agreement which is not to be performed within the space of one year from the making thereof, within the meaning of Sec. 4. The contract set up by the plaintiff is, therefore, not of necessity within the statute, and the case must go down for a new trial.

WILLS and CHANNELL, JJ., concurred.

New trial ordered. Leave to appeal.[2]

WILLIAM D. ODELL, RESPONDENT, *v.* HENRY WEBENDORFER, APPELLANT

APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, APRIL TERM, 1900

[*Reported in* 50 *New York Supreme Court, Appellate Division,* 579]

HIRSCHBERG, J. The plaintiff alleges that he was hired by the defendant on April 1, 1898, to work his farm for one year and to furnish an additional man, for which he was to be paid sixty dollars a month, and to receive house rent, a horse once a week, four quarts of milk per day, potatoes, apples, and stable room. He claims that he was unlawfully discharged December 1, 1898, and sues for his money wages during the remainder of the term, and for the value of the "privileges." The defendant denied that the hiring was for a year, alleged that the discharge was for adequate cause, and pleaded the Statute of Frauds.

The agreement for hiring, as stated by the plaintiff, was oral, and was made in the middle of March, 1898, for a year, to commence April 1, 1898. The plaintiff claims that the agreement was renewed April 1, 1898, but his evidence would seem to be limited to proof that its terms were merely restated, and that no new contract was actually entered into on that day. He said on direct examination: "Q. Was this talk the first of April? A. We were mention-

[1] 13 C. B. (N. S.) 406.

[2] The decision was affirmed by the Court of Appeal in [1903] 1 K. B. 538.

Oral Contracts for a year's service beginning the following day were upheld in Dickson *v.* Frisbee, 52 Ala. 165; Prokop *v.* Bedford Waist Co., 105 N. Y. Misc. 573, 187 N. Y. App. D. 662 (overruling earlier New York decisions to the contrary).

Such contracts were held unenforceable in Raymond *v.* Phipps, 215 Mass., 559; Brosius *v.* Evans, 90 Minn. 521; Keller *v.* Mayer Fertilizer Co., 153 Mo. App. 120; McElroy *v.* Ludlum, 32 N. J. Eq. 828.

ing over what it was already understood. Q. What was the talk? A. That was it. Q. Did you have a similar talk with him before? A. I did. Q. What was the occasion of your speaking to him that day? A. After I made the arrangements with Mr. Webendorfer to work for him, I heard that he didn't always stand up to his agreements, and I thought to make myself safe I would repeat it there on the first day of April, and have an understanding." On cross-examination he said: "Q. So that when it came the first of April you had no agreement to make with Mr. Webendorfer at all? A. Only to repeat the bargain. Q. Answer the question. Did you have any further agreement with him, did you have any further agreement or contract on the first day of April? A. I didn't presume it was necessary, but as I say, as I heard Mr. Webendorfer didn't always stand up to his agreements, I thought that it was necessary for me to repeat the contract, and see if it was satisfactory. Q. On the first day of April you talked over your previous contract? A. Yes, sir. Q. You made no new contract? A. No, sir, just the previous bargain."

By the plaintiff's own showing the contract was not made on the first of April. No contract was made that day, but only the terms of the prior contract were restated by either him or the defendant, for the sake of certainty as to the mutual obligations. What was actually said on the first of April does not appear in the case at all. This is not sufficient to take the case out of the operation of the statute. A new contract then made is requisite; that is, the former contract should then be expressly renewed or the employer cannot be held bound. Oddy *v.* James, 48 N. Y. 685; Berrien *v.* Southack, 26 N. Y. St. Rep. 932; Billington *v.* Cahill, 51 Hun, 132.

It was error also to permit the jury to include the "privileges" in the assessment of damages. The plaintiff made no proof whatever as to the money value of the privileges, and there was, therefore, nothing in the case on which the damages created by their loss could be estimated.

The judgment and order should be reversed and a new trial granted.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.[1]

[1] "On the new trial the plaintiff testified that on the 1st day of April, 1898, he had a separate and distinct understanding with the defendant as to what the bargain would be; that he stated to the defendant that he supposed his work was to commence that morning to continue for the year, and that they then had an understanding in his language as follows: 'He,' the defendant, 'said I was to work for the year and have sixty dollars a month, and I was to furnish my man, and I was to have the privilege of house rent, wood, potatoes, apples, and milk, and a horse and wagon once a week. I was to pay the hired man. Mr. Webendorfer was to pay me, and I was to pay the hired man out of what Mr. Webendorfer paid me. I was to board the hired man, and under that arrangement I went to work for Mr. Webendorfer at that time.' If this conversation really was had between the parties on April first, being in effect a distinct renewal of the contract as previously made and agreed upon, it would serve to take the case out of the opinion of the statute, notwithstanding that the terms of both

contracts were identical. On the second trial the plaintiff further testified that the first contract was made on Sunday and on election day, and that was one of the reasons why, to quote his words, 'I took pains to make the contract on the 1st of April again.' He further testified: 'Q. How did you happen to have this talk that you spoke of, with Mr. Webendorfer on the morning of the first of April? A. Well, because I had heard that Mr. Webendorfer didn't always stand to his agreements, and I thought to have myself secured. I thought I would make a new arrangement on the first of April and everything would be all right. Q. You thought you would repeat the bargain? A. I thought I would make the bargain."

"The difference in his evidence given on the two trials is vital. On the first trial the suggestion was a mere rehearsal of the terms of the original contract for the purpose of avoiding any misunderstanding as to what they were. On the second trial he testified that the bargain was expressly renewed." Odell *v.* Webendorfer, 60 N. Y. App. Div. 460, 461. See also Comes *v.* Lamson, 16 Conn. 246; Sines *v.* Superintendents, 58 Mich. 503; Turner *v.* Hochstadter, 7 Hun, 80; Lajos *v.* Eden Musee Co., 30 N. Y. Supp. 916.

CHAPTER V

PERFORMANCE OF CONTRACTS

SECTION I

EXPRESS CONDITIONS

A. — Conditions Precedent

CONSTABLE *v.* CLOBERIE

In the King's Bench, Hilary Term, 1626

[*Reported in Palmer,* 397]

Covenant upon a charter-party. The plaintiff covenanted that his ship should go a voyage to Cadiz with the next wind; and the defendant covenanted that if the ship went the intended voyage, and returned to the Downs, the plaintiff should have so much for the voyage. The defendant traversed that the ship went with the next wind, and upon demurrer the traverse was overruled, for the substance of the covenant was that the ship should go, and not that she should go with the next wind, for that may change every hour; and this is proved by the covenant of the defendant, viz., "if the ship went the intended voyage;" and this was the primary intention of the parties, and not that she should go with the next wind. But, per Justice Jones, if the defendant has covenanted that if the plaintiff went to Cadiz with the next wind, he would pay, &c., there the plaintiff ought to aver that he went with the next wind.

HALE *v.* FINCH

Supreme Court of the United States, November 7–Dec. 5, 1881

[*Reported in* 104 *United States,* 261]

This was an action for breach of an alleged covenant of the defendant that a steamboat the "New World" should not engage in business on the waters of the State of California, or upon the Columbia River. The steamboat had been originally bought by the

Oregon Steam Navigation Company from the California Steam Navigation Company and resold by the former company to one Winsor and Associates, who resold to the plaintiff Hale who in turn sold to the defendant Finch.

Mr. Justice Harlan [after discussing other points continued]:

This brings us to the main contention on behalf of plaintiffs in error, viz.: that the language of the bill of sale from Hale to Finch, if interpreted in the light of all the circumstances attending its execution, imports a *covenant* upon the part of the latter, that he would not use or permit the use by others, of the steamboat or its machinery, within a prescribed period, either upon the waters, rivers and bays of California, or upon the Columbia river and its tributaries. If, however, the language, properly interpreted, imports only a *condition,* for breach of which the vendor had no remedy other than by suit to recover the property sold, then it is, as indeed it must be, conceded, that the judgment below was right.

We are of opinion that the latter construction is the proper one.

If we look both at the circumstances preceding and at those immediately attending the purchase by Finch, and if we even impute to him full knowledge of everything that occurred, as well when the Oregon Steam Navigation Company made its original purchase, as when it subsequently sold to Winsor and his associates — all which counsel for plaintiffs contends we are bound, by the settled rules of law, to do — what do we find?

The written memorandum between that company and the California Steam Navigation Company, in words aptly chosen, shows, as we have seen, an express covenant and agreement, upon the part of the former, that neither the "New World," nor its machinery, shall be used on the waters of California within ten years from May 1, 1864, and, also, to pay a certain sum, as actual liquidated damages, for any breach of such covenant and agreement. The bill of sale from the Oregon Steam Navigation Company to Winsor and his associates did not contain any words of covenant or agreement. But that company, in view of its express covenants to the California Steam Navigation Company, took care to exact from its vendees a separate written obligation, in which the latter, in express terms, covenanted and agreed with that company, in like manner as the latter had covenanted and agreed with the California Steam Navigation Company. The next writing executed was the bill of sale from Winsor to Hale. That instrument shows nothing more than a covenant to warrant the title to the steamboat. It makes no reference, in any form, to any waters from which the steamboat should be excluded. Then comes the bill of sale executed by Hale to Finch. Its material portions are the same in substance and, in language, almost identical with the bill of sale given by the Oregon Steam Navigation Co. to Winsor. Each contains a covenant and agreement, upon the part of the vendor, simply to warrant and defend the title to the steam-

boat, its machinery, etc., against all persons whomsoever. But each recites, let it be observed, only an agreement that the *sale* is upon the *express condition* that it shall not be used or employed upon those waters. Upon the sale by the Oregon Steam Navigation Company to Winsor and his associates, the former, as we have seen, was careful to take the separate obligation of the latter, with surety, containing covenants and agreements, described in such terms as to show that the draughtsman, as well as all parties knew the difference between a covenant and a condition. The same criticism may be made in reference to the separate writing signed by Finch and Hale, at the time of the execution by the latter of the bill of sale to the former. The latter shows, it is true, several covenants and agreements upon the part of Finch, but no covenant or agreement in reference to the use of the boat, such as is found in the writings which passed between the California Steam Navigation Company and the Oregon Steam Navigation Company, or such as are contained in the separate agreement between the latter and Winsor and his associates.

If, therefore, we suppose (which we could not do without discrediting some of the testimony) that Finch, at the time of his purchase, had knowledge of all the papers executed upon prior sales of the "New World," the absence, as well from the bill of sale accepted by him, as from the written agreement of the same date, signed by him and Hale, of any *covenant* or *agreement* that he would not use that vessel, or permit it to be used, on the prohibited waters within the period prescribed, quite conclusively shows that he never intended to assume the personal responsibility which would result from such a covenant.

It thus appears that the circumstances, separately considered, militate against the construction for which plaintiff contends.

But, if we omit all consideration of the circumstances under which the bill of sale from Hale to Finch was executed, and look solely at the language employed in that instrument, there seems to be no ground upon which the claim of plaintiff can stand. The words are precise and unambiguous. No room is left for construction. It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, are necessary in order to charge a party with covenant. 1 Roll. Abr., 518; Lant *v.* Norris, 1 Burr., 287; Williamson *v.* Codrington, 1 Ves., 516 Sheppard's Touchstone, 161, 162; Courtney *v.* Taylor, 7 Scott (N. R.), 749; 2 Pars. Cont., 510. "The law," say Bacon, "does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." Bac. Abr., Covenant, A. So, in Sheppard's Touchstone, 161, 162, it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in what-

soever words it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement." "Sometimes," says Mr. Parsons, "words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties." 2 Pars. Cont., 510, 511. There are also cases in the books in which it has been held that even a recital in a deed may amount to a covenant. Farrall *v.* Hilditch, 5 C. B. (N. S.), 840; Great Northern R. W. Co. *v.* Harrison, 12 C. B., 576; Severn and Clerke's Case, 1 Leon, 122. And there are cases in which the instrument to be construed was held to contain both a condition and a covenant; as "If a man by indenture letteth lands for years, provided always, and it is covenanted and agreed, between the said parties, that the lessee should not alien." It was adjudged that this was "A condition by force of the proviso, and a covenant by force of the other words." Co. Litt., 203 b.

But according to the authorities, including some of those above cited, and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act. Comyns, in his Digest (Covenant, A 2), says that "Any words in a deed which show an agreement to do a thing, make a covenant." "But," says the same author, "where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate; as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses." Com. Dig., Covenant, A 3. The language last quoted is found also in Platt's Treatise of the Law of Covenants. Law Library, Vol. 3, p. 17. It there appears in connection with his reference to the case where A leased to B for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them. In such case, the author remarks, the lessee was held liable to an action for omitting to leave the houses in good plight, "for here an agreement was implied."

Applying these doctrines to the case before us, its solution is not difficult. Without stopping to consider whether a covenant upon the part of Finch could arise out of a bill of sale which he did not sign, but merely accepted from his vendor (Platt, Covenants, ch. 1), it is sufficient to say that that instrument contains no agreement or engagement or promise by him that he would or would not do anything. There is, in terms, a covenant by Hale to Finch to defend the title of the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement, not that Finch would not use, or permit others to use, the boat and its machinery upon the prohibited waters within the period

limited, but only an agreement that the *sale* was upon the *express condition* that neither the boat nor its machinery should be so used. It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement or promise by the vendee that he would personally perform or become personally responsible for the performance of the express condition upon which the sale was made. The vendee took the property subject to the right which the law reserved to the vendor, of recovering it upon breach of the condition prescribed. The vendee was willing, as the words in their natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement upon his part, that he would not use, and should not permit others to use, the boat or its machinery upon the waters and within the period named. If this be not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned, by mere construction, and against the apparent intention of the parties, into a covenant or agreement involving personal responsibility. The vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition — stated in such form as to preclude the idea of personal responsibility upon the part of the vendee — we should give effect to their intention, thus distinctly declared. *Judgment affirmed.*[1]

STEWART *v.* GRIFFITH, EXECUTOR OF BALL, DECEASED

SUPREME COURT OF THE UNITED STATES, April 8–25, 1910

[*Reported in* 217 *United States* 323]

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity, brought by the executor of one Ball for the specific performance of a contract made by the appellant to purchase certain land. The plaintiff had a decree in the Court of Appeals of the District of Columbia, and the defendant appealed. 31 App. D. C. 29.

The material parts of the contract are as follows: "This agreement, Made by and between L. A. Griffith, duly authorized Agent and Attorney under a certain power of Attorney from Alfred W. Ball both of Prince George's County, Maryland, parties of the first part, and Wm. W. Stewart of Washington, D. C., of the second part, Witnesseth that the said W. W. Stewart has paid to the said L. A. Griffith, Agent, the sum of Five Hundred Dollars ($500) part pur-

[1] The statement of facts is abbreviated and a portion of the opinion omitted.

chase price of the total sum to be paid for a certain tract of land, owned by the said Alfred W. Ball," in Maryland as described, "same being sold at the rate of $40 per acre." "And the said L. A. Griffith as the Agent and duly authorized Attorney of said Alfred W. Ball, hereby grants bargains and sells, and agrees to convey by proper deed . . . duly executed by the said Ball to the said Stewart the said Two Hundred and forty acres of land upon further payments and conditions hereinafter named to wit: The balance of one-half of the purchase price of the said 240 acres, more or less, at the rate of Forty dollars per acre is to be paid to the party of the first part on the 7th day of November 1903, and the remaining one-half of the total purchase price, is to be divided into five equal payments secured by five promissory notes, secured by purchase money mortgage upon the said property to be given by the said Stewart and Wife," with immaterial details. A burial lot of one acre is reserved "conditioned however that if the said Ball should desire to abandon the said burial tract . . . he shall have paid to him therefor by the said party of the second part the sum of ($40) Forty Dollars," &c. "The said land is to be surveyed and a plat made thereof, and the total purchase-price is to be at the rate of Forty Dollars per acre as determined by the said Survey the costs of the said Survey is to be borne equally by the said parties of the first part and the second parts; the said L. A. Griffith and W. W. Stewart each to pay one-half of the total survey costs. Proper Deed or Deeds of Conveyance and abstracts of title of the said land based upon title search therefor is to be made and by J. K. Roberts . . . showing clear and unencumbered fee simple title, in the said land above mentioned and described, in the said Alfred W. Ball, and one half of the total costs for same not exceeding $50, is to be borne equally by the parties hereto. In case the remainder of the first half of the purchase price be not paid on November 7, 1903, then the said $500 so paid to the said Griffith is to be forfeited and the Contract of sale and conveyance to be null and void, and of no effect in law, otherwise to be and remain in full force." . . . "The possessory right to all of the said premises on the property mentioned herein is to remain in the said Ball, until the one-half payment of the total purchase price herein provided for on November 7th, 1903, has been fully paid and satisfied, to the said L. A. Griffith, Agent. Witness our hands and seals this 5th day of June 1903. L. A. Griffith. Wm. W. Stewart." With seals.

The first defense is based on this document itself. It is said that the defendant made no covenant and therefore was free to withdraw if he chose to sacrifice the five hundred dollars that he had paid. This contention should be disposed of before we proceed to the other questions in the case. The argument is that the condition of forfeiture just stated and the consequence that the contract

is to be void and of no effect in law disclose the only consequences of default on the purchaser's part, much as until after Lord Coke's time the only consequence of breaking the condition of a bond was an obligation to pay the penalty. The obligor was held to have an election between performing the condition and payment. Bromage *v.* Genning, 1 Roll. R. 368; 1 Inst. 206*b;* Hulbert *v.* Hart, 1 Vern. 133 (1682). Some circumstances were referred to in aid of this conclusion, but as we think the meaning of the document plain we shall not mention them, except in connection with other matters, further than to say that there is nothing that would change or affect our view.

It seems to have been held within half a century after Hulbert *v.* Hart, that, under some circumstances at least, a bond would be construed to import a promise of the event constituting the condition. Hobson *v.* Trevor, 1 Strange, 533, *S. C.,* 2 P. Wms. 191 (1723). *Anonymous,* Moseley, 37 (1728); Roper *v.* Bartholomew, 12 Price, 797, 811, 822, 826, 832. Hooker *v.* Pynchon, 8 Gray, 550, 552. But in this case we are not confined to a mere implication of a promise from the penalty. The tenor of the "agreement" throughout imports mutual undertakings. The $500 is paid as "part purchase price of the total sum to be paid," that is, that the purchaser agrees to pay. The land is described as "being sold." There are words of present conveyance inoperative as such but implying a concluded bargain, like the word "sold" just quoted. So one-half of the purchase price "is to be" divided and the notes secured by mortgage "to be given;" and in the case of the burial lot Ball "shall have paid to him" $40 if he elects to abandon it: Here is an absolute promise in terms, which it would be unreasonable to make except on the footing of a similar promise as to the main parcel that the purchaser desired to get. We are satisfied that Stewart bound himself to take the land. See Wilcoxson *v.* Stitt, 65 California, 596. Dana *v.* St. Paul Investment Co., 42 Minnesota, 194. The condition plainly is for the benefit of the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word void means voidable at the vendor's election and the condition may be insisted upon or waived at his choice. Insurance Co. *v.* Norton, 96 U. S. 234. Oakes *v.* Manufacturers' Insurance Co., 135 Massachusetts, 248, 249. Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 419.

Decree affirmed.[1]

[1] A portion of the opinion is omitted.

WORSLEY *v.* WOOD and Others, *Assignees of* Lockyer and Bream, *Bankrupts;* in Error

In the King's Bench, June 7, 1796

[*Reported in* 6 *Term Reports,* 710]

This was an action of covenant brought in the Court of Common Pleas.[1] The declaration stated that by a policy of insurance made before Lockyer and Bream became bankrupts, namely, on the 9th of March, 1792, it was witnessed that Lockyer and Bream had paid 11*l.* 16*s.* to the Phœnix Company, and had agreed to pay to them, at their office, the sum of 11*l.* 16*s.* on the 25th of March, 1793, and the like sum yearly on the said day during the continuance of the policy for insurance from loss or damage by fire, not exceeding the sum of 7,000*l.* That Worsley covenanted with L. and B. that, so long as the assured should pay the above premium, the capital stock and funds of the Phœnix Company should be liable to pay to the assured any loss that the assured should suffer by fire on the property therein mentioned, not exceeding 7,000*l.*, according to the tenor of the printed proposals delivered with the policy. That in the printed proposals referred to by the policy it is declared that all persons assured sustaining any loss by fire should forthwith give notice to the company, and as soon as possible after deliver in as particular an account of their loss as the nature of the case would admit, and make proof of the same by their oath and by their book of accounts, or other vouchers as should be reasonably required, and should procure a certificate under the hands of the minister and churchwardens and of some reputable householders of the parish, not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned; and in case any difference should arise between the assured and the company touching any loss, such difference should be submitted to the judgment of arbitrators. The declaration then stated that on the first of July, 1792, a loss happened by fire in the house of L. and B., in which all their books of accounts were destroyed, to the amount of 7,000*l.* That L. and B. on the same day gave notice of it to the company, and on the same day delivered to the company as particular an account of their loss as the nature of the case admitted, and were then and there also ready and willing and then and there tendered to make proof of the loss by their oath, and to produce such vouchers as could be reasonably required in that behalf; that on the same day they procured and delivered to the said company a certificate under the hands of four reputable house-

[1] See 2 H. Bl. 574.

holders of the parish, to the effect required in the printed proposals, and applied to E. Embry, the minister, and H. Hutchins and J. Bellamy, the churchwardens of the parish, to sign such certificate, but that they, without any reasonable or probable cause, wrongfully and unjustly refused and have ever since refused to sign it. The declaration then stated that the funds of the company were sufficient to pay this loss, yet the company have not paid it, either to the bankrupts or to their assignees; nor have the company submitted the said difference to the judgment of such arbitrators, &c.

The defendant pleaded 3d: That the minister and churchwardens did not refuse wrongfully and injuriously, and without any reasonable or probable cause, to sign the certificate; on which issue was taken.[1]

The jury found all the issues for the plaintiffs, and gave a verdict for 3,000*l.*

The defendant below removed the record into this Court by writ of error, and assigned for error that the declaration, the replication, and the other pleadings of the plaintiffs below, were not sufficient in law to maintain the action.

This case was twice argued in this Court, the first time in last Easter Term by *Wood* for the plaintiff in error and *Lambe* for the defendants, and now by *Law* for the former and *Gibbs* for the latter.

Lord Kenyon, C. J.[2] We are called upon in this action to give effect to a contract made between these parties; and if from the terms of it we discover that they intended, that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favor of the defendant below. These insurance companies, who enter into very extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions. Common prudence, therefore, suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts. The Phœnix Company have provided, among other things, that the assured should, as soon as possible after the calamity has happened, deliver in an account of their loss, and procure a certificate under the hands of the minister and churchwardens, and of some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and believed that they had sustained the loss without any kind of fraud. That this is a prudent regulation, this very case is sufficient to convince us; for it appears on the record, that soon after the fire the assured delivered in an account of their loss, which they said amounted to 7,000*l.*, that they obtained a certificate from some of the reputable inhabitants that the loss did amount to that sum, and that the jury after inquiring into all the circumstances were of opinion that the

[1] The statement of the pleadings is abbreviated and a portion omitted.

[2] Ashhurst, Grose, and Lawrence, J. J., delivered concurring opinions.

loss did not exceed 3,000*l.*; and yet it is also stated that the minister and churchwardens, who refused to certify that they believed that the loss amounted to 7,000*l.*, wrongfully and without any reasonable or probable cause refused to sign such certificate. The great question here is, Whether or not it was the intention of these parties that that certificate should precede payment by the insurance office; now it seems to me from the printed proposals that it was their intention that it should precede payment. What is a condition precedent, or what a condition subsequent, is well expressed by my brother Ashhurst in the case of Hotham *v.* The East India Company, to which I refer in general. If there be a condition precedent to do an impossible thing, the obligation becomes single; but however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest. If the condition be, that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, yet from the time of Lord Coke to the present moment, it has not been doubted but that the right which was to depend on the performance of that condition did not arise. In the case of Hesketh *v.* Gray, which has been cited as a determination in this court, there was also an application to the Great Seal, at the time when Lord Chief Justice Willes was the first commissioner, to dispense with the condition, which was, that the Bishop of Chichester should accept the resignation of a living; but it was held, that there was no ground for a court of equity to interfere. This Court also held, when the case came before them, that it was a condition precedent, and must be performed.

In this case, however, it is said that, though the minister and churchwardens did not certify, some of the inhabitants did certify, and that that was sufficient, it being a performance of the condition *cy pres*. But I confess, I do not see how the terms *cy pres* are applicable to this subject; the argument for the plaintiffs below goes to show that if none of the inhabitants of this parish certified, a certificate by the inhabitants of the next or of any other parish would have answered the purpose. But the assured cannot substitute one thing for another. In the case of Campbell *v.* French, we explained the grounds of this doctrine, and said that the party who had not complied with the condition could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made. So here it was competent to the insurance office to make the stipulations stated in their printed proposals; they had a right to say to individuals who were desirous of being insured, "Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, churchwardens, and some of the reputable inhabitants of your parish shall certify that they believe that the loss happened by misfortune and without fraud, otherwise we will not contract with you at all." If the assured say that

the minister and churchwardens may obstinately refuse to certify, the insurers answer, "We will not stipulate with you on any other terms." Such are the terms on which I understand this insurance to have been effected; and, therefore, I am clearly of opinion, that there is no foundation for the action, and that the judgment below must be reversed.[1]

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* KEARNEY

SUPREME COURT OF THE UNITED STATES, November 7, 1900–January 7, 1901

[*Reported in* 180 *United States,* 132]

THE case is stated in the opinion of the court.

Mr. *E. S. Quinton,* for plaintiff in error.

Mr. *A. C. Cruce* and *Mr. W. I. Cruce,* for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought to recover the amount alleged to be due on two policies of fire insurance issued by the Liverpool and London and Globe Insurance Company — one dated June 15, 1894, for $2,500, and the other dated February 11, 1895, for $1,000 — each policy covering such losses as might be sustained by the insured Kearney & Wyse, in consequence of the destruction by fire of their stock of hardware in the town of Ardmore, Indian Territory.

Each policy contained the following clause, called the iron-safe clause: "The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in

[1] Prot. Ins. Co. *v.* Pharson, 5 Ind. 417; Johnson *v.* Phoenix Ins. Co., 112 Mass. 49; Audette *v.* Union St. Joseph, 178 Mass. 113; Lane *v.* St. Paul, 50 Minn. 227; Logan *v.* Commercial Union Ins. Co., 13 Can. S. C. 270, *acc.* See also Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507; Aetna Ins. Co. *v.* People's Bank, 62 Fed. Rep. 222; Daniels *v.* Equitable Fire Ins. Co., 50 Conn. 551; Leadbetter *v.* Etna Ins Co., 13 Me. 265; Kelly *v.* Sun Fire Office, 141 Pa. 10; Osewalt *v.* Hartford Fire Ins. Co., 175 Pa. 427.

O'Neill *v.* Massachusetts Benefit Assoc., 63 Hun, 292, 143 N. Y. 73; Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 46, *contra.*

See also American Central Ins. Co. *v.* Rothchild, 82 Ill. 166; German Am. Ins. Co. *v.* Norris, 100 Ky. 29; Home Fire Ins. Co. *v.* Hammang, 44 Neb. 566, 576; Schmurr *v.* State Ins. Co., 30 Oreg. 29.

the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

The insurance company insisted in its defence that the terms and conditions contained in this clause of the policies had not been kept and performed by the insured.

There was a verdict and judgment in favor of the plaintiffs in the United States Court for the Southern District of the Indian Territory, and that judgment was affirmed in the United States Court of Appeals for that Teritory.

The insurance company sued out a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and that court affirmed the judgment. 94 Fed. Rep. 314.

The controlling facts are thus (and we think correctly) stated in the opinion of Judge Thayer, speaking for the court below: "On the night of April 18, 1895, between the hours of one and three A. M., a fire accidently broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiffs' place of business that the windows of their store were cracking from the heat and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store, in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom, and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire, and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of plaintiffs, or either of them. The trial judge charged the jury that the set of books which had been kept and which were produced on the trial 'were substantially in compliance with the terms of the policy upon that subject,' and no exception was taken by the defendant to this part of the charge."

It was also said in the same opinion: "That books, though used at the trial as exhibits, do not form a part of the record. For these reasons no question arises as to the sufficiency of the set of books that was kept which we are called upon to consider. It must be taken for granted that it was a proper set of books, as the trial court held.

The only substantial ground for complaint seems to be that the inventory was not produced."

The argument in behalf of the defendant assumes that the insurance company is entitled to a literal interpretation of the words of the policies. But the rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. It was well said by Nelson, C. J., in Turley *v.* North American Fire Insurance Co., 25 Wend. 374, 377, referring to a condition of a policy of insurance requiring the insured, if damage by fire was sustained, to produce a certificate under the hand and seal of the magistrate or notary public most contiguous to the place of the fire setting forth certain facts in regard to the fire and the insured, that "this clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form — following words rather than ideas."

To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers, or agents prepared the policy, and it is its language that must be interpreted. National Bank *v.* Insurance Co., 95 U. S. 673, 678–9; Moulor *v.* American Life Ins. Co., 111 U. S. 335, 341.

Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement "to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business," should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show, to a man of ordinary intelligence, "all purchases and sales, both for cash and credit." There is no reason to suppose that the books of the plaintiff did not meet such a requirement.

That of which the company most complains is that the insured did not produce the last inventory of their business, and removed the books and inventory from the fireproof safe in which they had been placed the night of the fire. It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was

it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. It cannot be supposed that more was intended. If the company contemplated the use of a safe perfect in all respects and capable of withstanding any fire however extensive and fierce, it should have used words expressing that thought.

Nor do words "or in some secure place not exposed to a fire which would destroy the house where such business is carried on" necessarily mean that the place must be absolutely secure against any fire that would destroy such house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated. Indeed, upon the facts stated, the plaintiffs were under a duty to the insurance company to remove their books and inventory from the iron safe, and thereby avoid the possibility of their being destroyed in the fire that was sweeping towards their store, provided the circumstances reasonably indicated that such a course on their part would more certainly protect the books and inventory from destruction than to allow them to remain in the safe. If they believed, from the circumstances, that the books and inventory would be destroyed by the fire if left in the safe, and if, under such circumstances, they had not removed them to some other place and the books or inventory had been burned while in the safe, the company might well have claimed that the inability of the insured to produce the books and inventory was the result of design or negligence, and precluded any recovery upon the policies. We are of opinion that the failure to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory had been stolen, or had been destroyed in some other manner than by fire, although they had been placed "in some secure place not exposed to a fire" that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man, acting in good faith, would exercise.

A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice.

We perceive no error in the view taken by the court below; and having noticed the only questions that need to be examined, its judgment is *Affirmed.*

THE GLOBE MUTUAL LIFE INSURANCE ASSOCIATION OF CHICAGO *v.* DORA WAGNER

ILLINOIS SUPREME COURT, December 20, 1900

[*Reported in* 188 *Illinois,* 133]

ACTION by the appellee upon a policy of insurance on the life of her son, Richard Wagner. The plaintiff recovered judgment and the appellant appealed successively to the Court of Appeals and to this court. Further facts appear in the opinion.

Hoyne, O'Connor & Hoyne, for appellant.

Francis T. Colby, for appellee.

MR. JUSTICE WILKIN delivered the opinion of the court.

The chief ground urged by appellant for a reversal of the judgment of the Appellate Court is the falsity of the answer to one of the questions appearing in the medical examination of the insured. On the back of the application made by appellee, in what purports to be the medical examination of the insured, this question and answer appear: "Q. — How many brothers dead? Ans. — None." The medical examination is certified to by the medical examiner, as follows:

> "I certify that I have, this 7th day of October, 1895, made a personal examination of the above named person, (Richard Wagner,) and that the above answers are in my own handwriting, and that the signature of the applicant or person examined was written in my presence.
>
> "M. J. MCKENNA, M.D."

Preceding the medical examiner's certificate, and immediately at the end of the series of questions and answers referred to in the certificate, of which the quoted question is one, appears the following language, to which is affixed the signature of Richard Wagner, the insured: "I hereby declare and warrant that the answers to the above questions, and the statements made in the application on the other side hereof, are true, and were written by me or by my proper agent, and that said answers and statements, together with this warranty, shall form the basis of any contract of insurance that may be entered into between me and the Globe Mutual Insurance Association, and that if a contract of insurance is issued it shall not be binding on

the company unless, upon its date and delivery, I shall be in sound health." On the front side of the sheet, on the back of which is the medical examination and statement signed, as above, by the insured, is the application by appellee for the policy, and over her signature appears the following: "I hereby make application for the policy described above, and as an inducement to the association to issue a policy, and as a consideration therefor, make the agreement as to agency, and all other agreements, and warranties contained in the medical examination, as fully as if I had signed the same."

It appears from the evidence that a brother of the insured died in London, England, more than four years prior to the date of the application for insurance in this case, but there is no evidence tending to show that the insured ever knew of his brother's death. Appellant asserts, however, that, whether he knew of it or not, the statement that none of his brothers were dead is a warranty, and being untrue, avoids the policy. Appellee contends that the statement, though false, is not a warranty, but a mere representation, which, unless material, would not avoid the policy.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not. (Moulor *v.* American Life Ins. Co., 111 U. S. 335.) Whether or not the deceased knew of the death of his brother at the time of the application for insurance was a question for the jury, and no evidence of such knowledge appears in the record. To hold that, as a precedent to any binding contract, he should guarantee absolutely that none of his brothers were dead would be unreasonable, in the absence of a more explicit stipulation than here appears. It not infrequently happens that a man loses trace of all or part of his relations, and to hold him to absolutely guarantee that they were living, in order that he might obtain insurance, would sometimes be to require an impossibility, and would be almost absurd.

What is said in Moulor *v.* American Life Ins Co., *supra,* is peculiarly applicable to the case at bar. In that case the insured made a false statement as to his having had certain diseases, and "warranted that the above are fair and true answers." The court say: "The entire argument in behalf of the company proceeds upon a too literal interpretation of those classes in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were in any respect untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is comformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are, but in another and broader sense, the word 'true' is often used as a synonym of honest; sincere; not fraudulent. Looking at all

the clauses in the application, in connection with the policy, it is reasonably clear — certainly the contrary cannot be confidently asserted — that what the company required of the applicant as a condition precedent to any binding contract was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made fair and true answers." In that case the untrue statements were held to be representations, and not warranties, and we think, on the same reasoning, the answer here in question should be so held, and in the absence of proof by the company of fraud or intentional misstatement on the part of the insured the policy was not rendered invalid merely because the answer proved to be false.

We are satisfied the court below committed no reversible error, and the judgment of that court will be affirmed.

Judgment affirmed.

SHADFORTH *v.* HIGGIN

At Nisi Prius, coram Lord Ellenborough, Hilary Term, 1813

[*Reported in* 3 *Campbell,* 385]

Assumpsit upon the following agreement by the plaintiff and defendant: —

"James Shadforth, part-owner of the ship Fanny, of 300 tons, coppered and armed, agrees to despatch said vessel immediately in ballast direct to Jamaica, and, on her arrival at Rio Nova Bay, Salt Gut, and St. Ann's, receive a full and complete cargo of produce, consisting of sugar, rum, coffee, and pimento. In return Messrs. Higgin & Co. agree to provide a cargo at the above shipping places, to be taken on board in the usual manner, in time for July convoy, provided she arrives out and ready by the 25th of June, and the freight to be at the current rate as given to other vessels loading at the same time and same ports."

The declaration alleged that the plaintiff did immediately despatch the vessel in ballast to Jamaica, and that, on her arrival at Rio Nova Bay, she was afterwards, to wit, on the 3d of July, and from thence for a long space of time, to wit, for the space of three months from thence next ensuing, ready to receive at Rio Nova Bay, Salt Gut, and St. Ann's, aforesaid, a full and complete cargo of produce, according to the form and effect of the said agreement; yet that the defendant did not nor would provide a cargo for the said vessel at the above shipping places, or any or either of them, ac-

cording to the form and effect of the said agreement, whereby the said ship was obliged to return from Jamaica without any cargo being loaded on board thereof.

The ship in point of fact did not reach Jamaica till the 3d of July; and the question was, whether under these circumstances the defendant was answerable for having failed to furnish her with a full cargo.

Garrow, S. G., for the plaintiff, contended that the defendant was bound to furnish a full cargo for the ship at all events. Provided she arrived out and was ready by the 25th of June, this was to be done in time to enable her to sail with the July convoy. The condition of her arriving by 25th June only applied to the time of her departure on the homeward voyage. If by any accident her arrival was delayed beyond the day specified, she was still entitled to a cargo in a reasonable time, as if the proviso and the mention of the July convoy had not been introduced into the agreement. It could hardly be meant, that where the owner was absolutely bound to despatch his ship to Jamaica, if she arrived a day later than was expected, the freighter might send her home empty.

Lord Ellenborough. I think the arrival of the ship by the 25th June was a condition precedent. The freighter might know that, if she arrived by that day, he could easily provide a cargo for her; but that afterwards it might be impossible. He might have had goods of his own, which it was essentially necessary should be shipped by that day, and which he was therefore compelled to load on board another vessel. It would be a great hardship upon the freighter, if he were bound to provide a freight for a vessel which arrives at a season of the year when there is no produce ready for shipping in the island. If the freighter is liable, although the ship does not arrive till a week after the day agreed upon, where is the line to be drawn? I think the fair interpretation of the instrument is that, unless the ship arrived by the 25th June, the defendant's liability was to be at an end.

The plaintiff likewise failed in establishing another agreement declared upon for the loading of the ship, and submitted to be nonsuited.[1]

[1] Smith *v.* Dart, 14 Q. B. D. 105; The Austin Friars, 71 L. T. 27, *acc.*

In the Austin Friars, *supra*, the charterers had the option of cancelling "if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th of October." The vessel arrived at 11 P.M. on that day, but no one could leave or visit the ship until the health officer had inspected her on the following morning. It was held that the charterers were justified in refusing a cargo.

MORGAN *v.* BIRNIE

In the Common Pleas, April 17, 1833

[*Reported in* 9 *Bingham,* 672]

This was an action on a builder's contract, by which it was stipulated, among other things, that all the proposed erections should be done in a good and workmanlike manner, and with good, sound, and well-seasoned materials, and be completed to the reasonable satisfaction of A. B. Clayton, or other the architect for the time being of the defendant, his executors or administrators, on or before the twenty-ninth day of October next ensuing the date thereof, or such further day as the said A. B. Clayton, or such other architect, and the said plaintiff should mutually agree upon. It was further provided, that no additions or alterations should be admitted unless directed by the defendant, his executors or administrators, or his or their surveyor, in writing; nor should any addition to or alterations of the works thereby contracted for, and contained in the particulars therein specified, vitiate or vacate the contract thereby made, but the price or allowance to be made in respect of any agreed additions or alterations should be added to or deducted from the moneys that should become payable by virtue of the said memorandum of agreement as the case might require, such price or allowance being first estimated or settled by the surveyor or architect of the said defendant, who should be sole arbitrator in settling such price or allowance, and all disputes that should or might arise in or about the premises: And the defendant thereby promised and agreed, in consideration of the buildings and works to be done and executed by the said plaintiff, in manner in the said memorandum of agreement mentioned, that the defendant would pay, or cause to be paid, to the plaintiff, the sum of 1,250*l.* in manner following, that is to say, that he would pay or cause to be paid such a sum of money as would be equal to three-fourth parts of the price of the works thereby contracted for, which should have been executed and performed according to the true intent and meaning of the said memorandum of agreement, upon receiving a certificate in writing signed by the said A. B. Clayton, or other the architect of the defendant, testifying that the flooring-joists of the first story of the said dwelling-house had been actually laid, and his approval of the works so executed; such further sum of money as would be equal to three-fourth parts of the price or value of the further works that should have been done subsequently to the date of the architect's said certificate, upon the completion of the carcase of the dwelling-house; and the balance or sum which should be found due to the plaintiff, after deducting the two previous payments, within two calendar months after receiving the said architect's certificate that the whole of the buildings

and works thereby contracted for had been executed and completed to his satisfaction.

The work having been completed, the plaintiff sought by this action to recover his charges for some additional work not contained in the original contract.

At the trial it appeared that Mr. Clayton, the architect, had examined and approved of the plaintiff's charges for the buildings mentioned in the agreement, and had written the following letter to the defendant, more than two months before the action: —

With this you will receive Mr. Morgan's account. My private statement, showing the variations of prices and qualities, shall be copied and forwarded to you. As regards to when and where executed, my only data exist in my measuring book, which shall be open for your inspection at any time at my office. I also forward you the drawings marked 6 and 7, and the original elevation and plan submitted to the commissioners of woods and forest.

I remain, &c. A. B. CLAYTON

March 24, 1832.

This letter contained an account, headed, "Final statement of extras and omissions of the carcase of a house for George Birnie, Esq., by T. Morgan, builder."

A letter was also put in, addressed to Clayton by the defendant, April 4, 1832, in which he asked for Clayton's private statement of prices and quantities; expressed himself anxious to have the matter speedily settled, and made no objection on the ground of not having received a certificate. But as it did not appear that Mr. Clayton had ever given any certificate of his satisfaction as to the mode in which the work had been executed, Tindal, C. J., directed a nonsuit, on the ground that the delivery of such a certificate was a condition precedent to the plaintiff's right of action.

Spankie, Serjt., now moved to set aside this nonsuit on the ground that the agreement did not require the certificate touching the additions to be in writing; and that Mr. Clayton's allowance of the plaintiff's charges must be deemed an implied certificate, for he could not allow the charges to be correct without implying thereby that the building had been executed to his satisfaction. Besides, it might be doubtful whether any certificate were requisite with respect to charges for additional work; the certificate was to apply only to the building as originally contracted for, and the defendant had never objected to pay on the ground that a proper certificate had not been rendered.

TINDAL, C. J. I was of opinion at the trial, and am still of opinion, that the production of a certificate from Mr. Clayton was a condition precedent to the bringing this action. The agreement stipulates, that the price of additions or alterations should be added to the sum contracted for by the agreement, such price being first settled by the architect of the defendant, who should be sole arbitrator in settling such price, and all disputes that should arise about the premises. Then follows the stipulation for payment in proportion to the work

done at two different periods upon receiving a certificate in writing of Mr. Clayton's approval, and for payment of the balance of the whole within two calendar months after receiving the said architect's certificate that the whole of the buildings contracted for had been executed to his satisfaction. That appears to involve not only the original but the additional or extra works. Unless the letter and delivery of the plaintiff's account, and the checking that account by Clayton, amount to a certificate, no certificate has been given. It appears to me, that the effect of a certificate would be altogether different; applying to the manner in which the work has been done, while the checking the accounts applies only to the propriety of the charges.

The rest of the Court concurring, the rule was *Refused.*[1]

CLARKE, *Assignee of the Estate and Effects of* FRANCIS AYRES, *a Bankrupt,* AND OTHERS *v.* WATSON AND ANOTHER

IN THE COMMON PLEAS, January 25, 1865

[*Reported in* 18 *Common Bench Reports, New Series,* 278]

THE first count of the declaration stated, that theretofore and before the said Francis Ayres became bankrupt, to wit, on the 9th of October, 1862, by an agreement in writing then made and entered into between the said Francis Ayres, William Mallows, and William Johnson, therein called "the contractors," of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works therein mentioned in conformity with certain plans, drawings, and sections therein mentioned; and also in conformity with certain specifications therein mentioned, as well as to the satisfaction and approval of the engineer to a certain board of health for the time, should such be found necessary, at or for 312*l.* 15*s.*, to be paid as follows: 156*l.* 7*s.* 6*d.* on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that they, the contractors, had duly and efficiently performed and completed such portion of the work as according to the judgment of the said surveyor should not be less than three-fourths parts thereof in extent and value; 78*l.* 3*s.* 9*d.* on the production by the said contractors to the defendants, or to one of them, of the certificate of the said surveyor as aforesaid, that the whole of the works mentioned and referred to in the said plans, drawings, and specifications, had been duly and efficiently performed and completely finished to his satisfaction, and also to the satisfaction of the said engineer for

[1] De Worms *v.* Mellier, L. R. 16 Eq. 554; Hudson *v.* McCartney, 33 Wis. 331; Bannister *v.* Patty, 35 Wis. 215, *accord.* Compare Wyckoff *v.* Meyers, 44 N. Y. 143.

the time being of the local board of health, if necessary; and the balance of 78*l.* 3*s.* 9*d.* at the expiration of four months from the date of the said surveyor's certificate of completion; provided the therein-mentioned roads, pathways, drains, and culverts, and every part thereof, should be certified by the said surveyor to be in good repair and in perfect and sound condition in all respects; it being thereby intended and agreed that all the said works and materials should be so put and kept in good repair until the expiration of such four months from completion by and at the sole cost and expense of the said contractors; and the defendants thereby agreed with the said Francis Ayres, William Mallows, and William Johnson, in consideration of the due performance of the said agreements therein contained on their part, to pay to them the sum of 312*l.* 15*s.* at the times and in the manner thereinbefore mentioned. Averment: that although 156*l.* 7*s.* 6*d.*, part of the said sum of 312*l.* 15*s.*, had been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants, that the whole of the works in the said plans, drawings, and specifications had been duly and efficiently performed and completed to his satisfaction, and also to the satisfaction of the engineer of the said local board of health, had been done and performed by them; yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, nor had the defendants paid the said sum of 78*l.* 3*s.* 9*d.* payable on such certificate; and that, although more than four months since the said surveyor ought to have given such certificate had elapsed, and although all things had been done by the said contractors on their part to entitle them to a certificate by the said surveyor that the said roads, pathways, drains, culverts, and every part thereof, were at the expiration of the said four months in good repair, and in perfect and sound condition in all respects, yet the said surveyor had not granted such certificate, but had wrongfully and improperly neglected and refused to do so, and the defendants had not yet paid the said balance of 78*l.* 3*s.* 9*d.*

The defendants demurred to this count, and the plaintiffs joined in demurrer.

Henry James, in support of the demurrer argued that the allegation that the surveyor wrongfully and improperly neglected and refused to grant his certificate would be satisfied by showing that he had been guilty of a mere error in judgment.

Parry, Serjt., *contra,* argued, "that the defendant who employs the architect does contract with the plaintiff that he will do his duty and act fairly."

Erle, C. J. I am of opinion that the judgment in this case ought to be for the defendants. The contract which they entered into was, to pay to the contractors, the plaintiffs, certain sums on production by them to the defendants, or one of them, of the certificate of

William Lambert, or other the surveyor for the time of the defendants. Many contracts are so made. Every man is the master of the contract he may choose to make; and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. And it is important, in a case of this description, that the person for whom the work has been done should not be called upon to pay for it until some competent person shall have certified that the work has been properly done, according to the contract and specification. Here the contract is, that the money shall become payable on production by the plaintiffs to the defendants of the certificate of their (the defendants') surveyor, that the contractors have duly and efficiently performed and completed the work to his satisfaction. No such certificate has been produced. But it is said that the plaintiffs have done all things necessary to entitle them to have the certificate of the surveyor that the works had been duly performed and completed to his satisfaction, and that the said surveyor had "wrongfully and improperly" neglected and refused so to do. That, in my opinion, is not sufficient. If it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld, they could not have sheltered themselves by their own wrongful act. But the word "wrongfully," as used here, does not intimate any thing of that sort. If the plaintiffs had intended to rely on the withholding of the certificate as a wrongful act on the part of the defendants, they should have stated how it was wrongful. This is in effect an attempt on the part of the plaintiffs to take from the defendants the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract which the defendants have entered into. The allegations on the part of the plaintiffs are not in my judgment such as to entitle them to succeed.

Williams, J. I am of the same opinion. Notwithstanding the surveyor may have been wrong in withholding his certificate, the money is not due.

Willes, J. I am of the same opinion. Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error in judgment, or he may have refused to exercise any judgment; in which case the proper course would have been to call upon the defendants to appoint some other surveyor who will do his duty.

Keating, J., concurred. *Judgment for the defendants.*

BATTERBURY *v.* VYSE

In the Exchequer, April 22, 1863

[*Reported in 2 Hurlstone & Coltman,* 42]

Declaration. For that heretofore, to wit, on, &c., the plaintiff and the defendant agreed that the defendant should employ the plaintiff to do and provide for him, and that the plaintiff should do for the defendant certain specified works, and provide for the defendant certain specified materials, at No. 125 Oxford Street, upon the following terms and conditions, that is to say: "All the works hereinbefore described (meaning the description contained in a certain specification of the said works) are to be executed in the very best and most workmanlike manner, with the very best quality of materials of every description, under the superintendence and to the satisfaction of Mr. Vyse and his architect. The works described are intended to embrace every thing that may be necessary for the perfect completion of the several alterations. If, therefore, through any error or inadvertence, any matter or thing which may be deemed by the architect as essential to this end be omitted, it is to be supplied and performed by the contractor in like manner as if it had been particularly specified; and if in the course of the work it should be found necessary to make any addition to or omission from the said works such deviation is not in any way to vitiate the contract, but the value of such works shall be estimated by the architect, and the value thereof added to or deducted from the contract sum as the case may be, the decision of the architect being final and conclusive in all matters affecting the proposed works. The amount of the contract will be paid by instalments equal to the value of 80*l.* per cent of the value of the works executed, the balance within one month after final completion to the architect's satisfaction, but no payment will be considered due unless upon production of the architect's certificate." Then followed an agreement by the defendant to execute the works for 610*l.* Averments: That pursuant to the contract the plaintiff did the specified works and provided the materials, with the exception of certain omissions which were duly required by the defendant and his architect; and that he also did divers and very many additional works which were duly required to be done by the defendant and his architect; and that the value of the said works and materials amounted to a large sum, to wit, 1,000*l.*, whereof the defendant had due notice; and although the defendant paid to the plaintiff 600*l.*, on account of the said works, leaving a large balance, to wit, 400*l.*, of the fair and reasonable value of the said works, estimated according to the said contract, unpaid; and although the plaintiff had done all things necessary on his part to entitle him to have the value of the said extras and omissions estimated by the said architect, and to entitle him to the said architect's certificate

for payment; and although he had completed the said works to the satisfaction of the defendant's architect; and although more than a month from such time had elapsed; and although the defendant and his architect had, at all times since the doing of the said works and the providing of the said materials, full knowledge that the plaintiff was entitled to be paid by the defendant a large sum of money over and above the money so paid; and although a reasonable time for the said architect to estimate the value of the said additions and omissions, and to certify as aforesaid, and for the defendant to pay for the said works, had long since elapsed; yet the architect had not estimated the value of the said additions and omissions, nor had he certified as aforesaid, but wholly neglected so to do, and had unfairly, improperly, and contrary to the true intent and meaning of the said contract, neglected to estimate the value of the said additions and omissions, and neglected to certify as aforesaid, and had so neglected in collusion with the defendant and by his procurement. By means of which premises the plaintiff has been unable to obtain payment of the balance justly due to him for the said works, and the said balance still remains wholly due and unpaid to the plaintiff.

Demurrer, and joinder therein.

Gates, in support of the demurrer. The declaration is bad. The production of the architect's certificate is a condition precedent to the plaintiff's right to claim any payment. [MARTIN, B. This is, in substance, a declaration in case alleging that the defendant, acting in collusion with the architect, procured him unfairly and improperly to withhold his certificate.] Treated as an action of contract, the plaintiff cannot recover, because he has not complied with the condition which entitled him to payment; and it is not an action on the case, because it does not charge fraud, or allege any duty on the part of the defendant which he has neglected to perform. However unreasonable and oppressive a stipulation or condition may be, a court of law is bound to give effect to the terms agreed upon between the parties. Stadhard *v.* Lee.[1] [BRAMWELL, B. That case does not touch this. Here the complaint is not that something has been done, and done wrongly, but that there has been an improper refusal to do that which ought to have been done.] The opinion of refusal to do that which ought to have been done.] The opinion of authority that, in the absence of fraud, the withholding the certificate by the architect affords no right of action against the defendant, either on the ground of a waiver of the condition, or the substitution of a new contract, or on the ground of a wrong. This is an attempt to obtain indirectly that which the plaintiff is not entitled to by the terms of his contract. If, indeed, the certificate was withheld by fraud, the plaintiff might have a remedy by action. Milner *v.* Field. But it is consistent with every allegation in this declara-

[1] 3 B. & S. 364, 372. [2] 1 Giff. 216, 223.

tion that the architect was requested by the defendant not to certify, because he was dissatisfied with the work. [WILDE, B. The declaration contains an averment that the plaintiff had done all things necessary to entitle him to the certificate, and that he had completed the works to the satisfaction of the defendant's architect; and that, although the defendant and his architect had knowledge that the plaintiff was entitled to be paid, the architect neglected to certify, "in collusion with the defendant and by his procurement."] There is no allegation that the works were done to the satisfaction of the defendant. [WILDE, B. There is an averment that the plaintiff had done all things necessary to entitle him to the certificate.] The word "collusion" does not necessarily imply fraud. [POLLOCK, C. B. In Webster's Dictionary one definition of "collusion" is "a secret agreement for a fraudulent purpose."]

J. Brown appeared in support of the declaration, but was not called upon to argue.[1]

POLLOCK, C. B. We are all of opinion that the declaration is good, and that the plaintiff is entitled to judgment.

MARTIN, B., and BRAMWELL, B., concurred.

Judgment for the plaintiff[2]

MICHAEL NOLAN ET AL., RESPONDENTS, *v.* CORDELIA C. WHITNEY, APPELLANT

NEW YORK COURT OF APPEALS, February 7–28, 1882

[*Reported in* 88 *New York,* 648]

IN July, 1877, Michael Nolan, the plaintiff's testator, entered into an agreement with the defendant to do the mason work in the erection of two buildings in the City of Brooklyn for the sum of $11,700,

[1] The point for argument was: "That the defendant who employs the architect does contract with the plaintiff that he will do his duty and act fairly."

[2] St. Louis, &c. R. R. Co. *v.* Kerr, 153 Ill. 182; Crawford *v.* Wolf, 29 Ia. 567; Smith *v.* White, 5 Neb. 405; Whelen *v.* Boyd, 114 Pa. 228; Mills *v.* Paul (Tex. Civ. App.), 30 S. W. Rep. 558, *acc.*

See also Linch *v.* Paris Lumber Co., 80 Tex. 23; Markey *v.* Milwaukee, 76 Wis. 349.

Fraud or refusal to exercise an honest judgment, though without collusion of the defendant, has also been held an excuse for failure to produce a certificate. North American Ry. Const. Co. *v.* R. E. McMath Surveying Co., 116 Fed. Rep. 169; Utah Construction Co. *v.* St. Louis &c. Co., 254 Fed. 321; Hatfield District *v.* Knight, 112 Ark. 83; Ferguson *v.* Christenson, 59 Colo. 42; Michaelis *v.* Wolf, 136 Ill. 68; McDonald *v.* Patterson, 186 Ill. 381; Foster *v.* McKeown, 192 Ill. 339; Hebert *v.* Dewey, 191 Mass. 403; Marsch *v.* Southern New Eng. R. Corp., 230 Mass. 483; Eldridge *v.* Fuhr, 59 Mo. App. 44; Chism *v.* Schipper, 51 N. J. L. 1; Bradner *v.* Roffsell, 57 N. J. L. 32.

See also Arnold *v.* Bournique, 144 Ill. 132; Bean *v.* Miller, 69 Mo. 384; Justice *v.* Elwert, 28 Oreg. 466.

to be paid to him by her in instalments as the work progressed. The last instalment of $2,700 was to be paid thirty days after completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morrill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming that he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate which, by the terms of his agreement, would entitle him to the final payment. The referee found that Nolan completed the mason work required by the agreement according to its terms; that he in good faith intended to comply with, and did substantially comply with, and perform the requirements of his agreement; but that there were trivial defects in the plastering for which a deduction of $200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less $200.

The court say: "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. Smith *v.* Brady, 17 N. Y. 189; Thomas *v.* Fleury, 26 id. 26; Glacius *v.* Black, 50 id. 145; Johnson *v.* De-Peyster, 50 id. 666; Phillip *v.* Gallant, 62 id. 256; Bowery Nat. Bank *v.* The Mayor, 63 id. 336. According to the authorities cited under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable;

and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

Oscar Frisbie, for appellant.

N. H. Clement, for respondent.

EARL, J., reads for affirmance.

All concur. *Judgment affirmed.*[1]

[1] In Vought *v.* Williams, 120 N. Y. 253, an action for breach of a contract to buy real estate which provided that the title was to be passed upon by a lawyer or conveyancer to be designated by the defendant, the court, while refusing specific performance on the ground that the plaintiff's title was defective, said: "The provision that the title was to be passed upon by the defendant's lawyer or conveyancer did not make the decision of the conveyancer that the title was good, a condition precedent to the right of the plaintiff to enforce the performance of the contract. If a decision to that effect was refused unreasonably, the failure to obtain it would not defeat a recovery, and it would have been unreasonably refused if, in fact, beyond all dispute the title was good. Folliard *v.* Wallace, 2 Johns. 395; Thomas *v.* Fleury, 26 N. Y. 26; City of Brooklyn *v.* B. C. R. R. Co., 47 N. Y. 475; B. N. Bank *v.* Mayor, etc., 63 N. Y. 336; D. S. B. Co. *v.* Garden, 101 N. Y. 388; Doll *v.* Noble, 116 N. Y. 238."

See also Van Keuren *v.* Miller, 71 Hun, 68; Anderson *v.* Imhoff, 34 Neb. 335; Thomas *v.* Stewart, 132 N. Y. 580, 586; Macknight Flintic Stone Co. *v.* Mayor, 160 N. Y. 72, 86; Whelen *v.* Boyd, 114 Pa. 228; Sullivan *v.* Byrne, 10 S. C. 122; Norfolk, &c. Ry. Co. *v.* Mills, 91 Va. 613; Washington Bridge Co. *v.* Land & River Improvement Co., 12 Wash. 272; Bentley *v.* Davidson, 74 Wis. 420; Wendt *v.* Vogel, 87 Wis. 462.

In Van Clief *v.* Van Vechten, 130 N. Y. 571, the court, referring to a building contract, said: "The question of substantial performance depends somewhat on the good faith of the contractor. If he has intended and tried to comply with the contract and has succeeded, except as to some slight things omitted by inadvertence, he will be allowed to recover the contract price, less the amount necessary to fully compensate the owner for the damages sustained by the omission. Woodward *v.* Fuller, 80 N. Y. 312; Nolan *v.* Whitney, 88 id. 648; Phillip *v.* Gallant, 62 id. 256, 264; Glacius *v.* Black, 50 id. 145; s. c. 67 id. 563, 566; Johnson *v.* DePeyster, 50 id. 666; Sinclair *v.* Tallmadge, 35 Barb. 602. But when, as in this case, there is a wilful refusal by the contractor to perform his contract and he wholly abandons it, and after due notice refuses to have anything more to do with it, his right to recover depends upon performance of his contract, without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. While slight and insignificant imperfections or deviations may be overlooked on the principle of *de minimis non curat lex,* the contract in other respects must be performed according to its terms. When the refusal to proceed is wilful the difference between substantial and literal performance is bounded by the line of *de minimis.* Smith *v.* Brady, 17 N. Y. 173; Cunningham *v.* Jones, 20 id. 486; Bonsteel *v.* Mayor, etc., 22 id. 162; Walker *v.* Millard, 29 id. 375; Glacius *v.* Black, 50 id. 145; Catlin *v.* Tobies, 26 id. 217; Husted *v.* Craig, 36 id. 221; Flaherty *v.* Miner, 123 id. 382; Hare on Contracts, 569; Leake on Contracts, 821."

In Chicago, Santa Fé and California Railroad Company *v.* Price, 138 U. S. 185, an action for breach of a contract to pay for certain construction, the court said: "The written contract between the parties in this case does not materially differ from the one before this court in Martinsburg & Potomac Railroad Co. *v.* March, 114 U. S. 549, 553. In that case the contractor did not allege in his declaration that the engineer ever certified in writing the complete performance of the contract, together with an estimate of the work done and the amount of compensation due him according to the prices established by the parties; which certificate and estimate was made by the agreement a condition of the liability of the company to pay the contractor the balance, if any, due him. Nor did the declaration allege any facts which, in the absence of such certificate by the engineer whose determination was made final and conclusive, entitled the contractor to sue the company on the contract. It was held, in accordance with the principles announced in Kihlberg *v.* United States, 97 U. S. 398, and Sweeney *v.* United States, 109 U. S. 618, that the declaration was fatally defective in that it contained 'no averment that the engineer had been guilty of fraud, or had, made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him.'

THURNELL *v.* BALBIRNIE

In the Exchequer, Trinity Term, 1837

[*Reported in* 2 *Meeson & Welsby,* 786]

The first count of the declaration stated, that before and at the time of making the agreement and the promise and undertaking of the defendant thereinafter mentioned, the defendant held, occupied, and enjoyed, at his request, certain rooms, apartments, and premises of the plaintiff, as tenant thereof to the plaintiff, the same then being part and parcel of a dwelling-house of the plaintiff, and in which there were certain goods and fixtures and chattels, to wit, &c., of the plaintiff, of great value, to wit, of, &c.; and thereupon heretofore, to wit, on the 26th of December, 1836, it was agreed by and between the plaintiff and the defendant in manner following, that is to say: the plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said goods, fixtures, and chattels, at a valuation to be made by certain persons, to wit, Mr. Newton and Mr. Matthews, or their umpire; and the plaintiff said, that the said Mr. Newton was appointed by and on behalf of the plaintiff, and the defendant, to value as aforesaid. The declaration then averred mutual promises, and alleged that Newton, on behalf of the plaintiff, was ready and willing to value the said goods, &c., and at the request and by the authority of the plaintiff requested Matthews to value the same, whereof the defendant and Matthews had notice; but that the defendant and

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Some observations in that case are pertinent in the present one. It was said: 'We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith.'"

In Chism *v.* Schipper, 51 N. J. L. 1, the court, while holding fraud on the part of an architect an excuse for non-performance of a condition precedent that his certificate should be procured, said: "Nor does it seem to me that by the adoption of the foregoing theory of explication these arbitration clauses will be shorn of any beneficial efficacy. The awards authorized by them will, for all useful purposes, be in truth finalities; they cannot be impeached for want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons; such awards can be vitiated by fraud alone, and which must be proved to the satisfaction of a jury under a watchful judicial supervision."

See also Kennedy *v.* United States, 24 Ct. Cl. 122; Dingley *v.* Greene, 54 Cal. 333; Fowler *v.* Deakman, 84 Ill. 130; Gilmore *v.* Courtney, 158 Ill. 432; Merrill *v.* Gore, 29 Me. 346; Baltimore & Ohio R. R. Co. *v.* Brydon, 65 Md. 198; Palmer *v.* Clark, 106 Mass. 373; Beharrell *v.* Quimby, 162 Mass. 571; Shaw *v.* First Baptist Church, 44 Minn. 22.

Matthews then and thence continually neglected and refused so to do. And the plaintiff further said, that he, the plaintiff, afterwards, to wit, on the 2d of February, 1837, gave notice to the defendant that the plaintiff's said appraiser and valuer, the said Newton, was ready to meet the defendant's appraiser and valuer, the said Matthews, or any other person he might think proper to nominate for the purpose on the defendant's behalf, at any time within ten days from the said 2d of February which the defendant might fix, to value the said goods, &c., of which the defendant then had notice, but then and thence hitherto wholly neglected and refused to appoint any day for his appraiser, the said Matthews, to value, and wholly neglected and refused to nominate any other appraiser, and during all that time has wholly refused and neglected to take any steps to value as aforesaid, or to cause or procure the same to be valued according to his said agreement and promise, and has during all the time aforesaid wholly refused to value the said goods, &c., or to let the same be valued, according to his said agreement and promise. And thereupon the said Mr. Newton afterwards, and after the lapse of a reasonable period of time, to wit, one month from the day and the year last aforesaid, proceeded to value and did then value the said goods, &c., and the price thereof upon such valuation reasonably amounted to the sum of 500*l.*, whereof the defendant had notice, and was requested to pay the same to the plaintiff. And the plaintiff further says, that he hath always from the time of making such valuation as aforesaid been ready and willing to sell and deliver to the defendant the said goods, &c., and to receive payment by him of the value thereof, whereof the defendant hath always had notice; yet the defendant, not regarding, &c., did not nor would, although often requested, take the said goods, &c., so agreed by him to be taken as aforesaid, and pay the plaintiff the value thereof, but hath hitherto wholly neglected and refused so to do, whereby, &c.

There were also counts for goods and fixtures bargained and sold, and on an account stated.

Special demurrer to the first count assigning, amongst other causes, the following: that the count does not sufficiently allege a breach of the defendant's promise therein mentioned, for that it does not allege that the defendant hindered or prevented the said persons appointed and agreed on to make the said valuation, or either of them, from making such valuation. And also that it is elleged by way of breach that the defendant refused to take the goods, &c., agreed by him to be taken, and that he also refused to pay to the plaintiff the value of the said goods, &c., and no agreement or promise is stated in the said count to take the said goods, &c., at their value generally, or at the valuation made by the said Mr. Newton, but at the valuation only of the said Newton and Matthews, or their umpire. Joinder in demurrer.

Kelly, in support of the demurrer. There are many objections in

point of form to this count; but the substantial question is, where two persons are by agreement appointed to make a valuation of goods, and one refuses, can either party be liable for a breach of the agreement? How could the defendant be bound to take or pay for the goods until they had been valued according to the agreement? [GURNEY, B. It is not said that Matthews omitted to value by the procurement of the defendant.] It is just as if an action were brought against a party to a submission, because one of the arbitrators refuses to make an award.

The Court here called upon

Hoggins, to support the declaration. It is specifically averred in the count that the defendant had notice that the plaintiff's appraiser was ready to value, and the breach assigned is, that he then wholly refused to let the goods be valued according to the agreement. It is submitted that that is sufficient to render him liable for the price. In Hotham *v.* East India Company it was held, that where the defendant by his neglect and default prevented the performance of a condition precedent in a charter-party, that was equivalent to a performance by the plaintiffs. In Raynay *v.* Alexander, where the plaintiff declared in assumpsit for non-delivery of fifteen tods of wool purchased by him out of seventeen, of which the defendant was possessed, the declaration was held bad for want of an allegation that the plaintiff had selected fifteen tods of the seventeen, which was an act to be first performed by him; but the Court said if the defendant would not have permitted the plaintiff to see the wool, that he might make election, that had excused the act to be done by the plaintiff, and had been a default in the defendant. If these cases be law, the facts alleged in this declaration make the defendant liable as for goods bargained and sold.

LORD ABINGER, C. B. I am of opinion that this count is bad. The agreement stated is an agreement to purchase goods on the valuation of Newton and Matthews. There is no distinct allegation that the defendant refused to permit Matthews to value on his part; but only an obscure statement that he refused to appoint any day for his valuing, or to take any steps to value or to cause and procure the goods to be valued, according to his agreement, and that he has refused to value the goods or to let them be valued according to his agreement; all which comes after the allegation that Matthews had refused to value, there being no statement that he had changed his mind and was ready and willing to do so, but that the defendant would not permit him. I am of opinion, therefore, that enough is not stated to render the defendant liable for the price of the goods.

BOLLAND, B., concurred.

ALDERSON, B. I should refer the words "or to let the same be valued," &c., to the defendant's letting the goods be valued by another appraiser instead of Matthews, according to the notice which the plaintiff says he gave him.

GURNEY, B., concurred.

Leave to amend on payment of costs; otherwise judgment for the defendant.[1]

GARDNER C. HAWKINS *v.* JOHN C. GRAHAM

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 22–May 11, 1889

[*Reported in* 149 *Massachusetts,* 284]

CONTRACT for breach of an agreement in writing, which was as follows: —

PHILADELPHIA, December 21, 1885.

MR. JOHN C. GRAHAM:

I do hereby agree that for and in consideration of the sum of fifteen hundred and seventy-five (1,575) dollars, to be paid me upon the satisfactory completion of the following system of heating to be established in your new mills [the system is here described]. It is further declared, and distinctly understood, that in the event of my not being able to properly heat every portion of the buildings as hereinbefore provided for, and in accordance with the requirements as above set forth, upon a ten (10) days' notice from yourself to the effect that the buildings are not being properly and sufficiently heated, and I cannot so heat it in ten days thereafter, I shall and will at my own expense remove all the machines and appurtenances belonging to the system, leaving the entire mill in a condition equal to that prior to the introduction of the same. In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of $1,575 as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated.

GARDNER C. HAWKINS.

[1] As to death of a valuer or architect, see Firth *v.* Midland Ry. Co., L. R. 20 Eq. 100; Hebert *v.* Dewey, 191 Mass. 403, 412; Meacham *v.* Railroad Co., 211, N. Y, 346.

In insurance policies an appraisal or valuation of the injury is frequently made a condition precedent to a right of action. In Brock *v.* The Dwelling House Ins. Co. 102 Mich. 583, it was held this condition was excused by the unreasonable action of the appraiser appointed by the company. The court say (p. 593): "It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit brought will not bar an action on the policy. McCullough *v.* Insurance Co., 113 Mo. 606; Bishop *v.* Insurance Co., 130 N. Y. 488; Uhrig Insurance Co., 101 id. 362; Bradshaw *v.* Insurance Co., 137 id. 137."

Compare Cooper *v.* Shuttleworth, 25 L. J. Ex. 114.

At the trial in the Superior Court, before Brigham, C. J., there was evidence that the plaintiff made the offer contained in the above agreement, and that the defendant accepted such offer.

The defendant contended that all the words of the contract were to be taken into consideration in its interpretation; that, in addition to the other requirements of the contract, the system of heating must prove satisfactory to the defendant; and the defendant offered evidence, not only that the system would not and did not do the heating as guaranteed, but that it did not prove satisfactory to the defendant.

The judge ruled that this contract did not come within the scope of the case of Brown *v.* Foster, 113 Mass. 136, and similar cases, and that if the plaintiff had fulfilled his contract in the other particulars required, he was entitled to recover, notwithstanding the dissatisfaction of the defendant; that under the contract the plaintiff was not bound to make the system satisfactory to the defendant, and that evidence on that point was immaterial; and that the trial should proceed on the theory that the satisfaction of the defendant was substantially eliminated from the case.

The plaintiff's evidence showed that the temperature of the different stories of the defendant's mill, which was one hundred and ninety-six feet long by fifty feet wide, and seventy-five feet high, varied, and that the temperature near where the hot air entered the rooms was higher by several degrees, in some instances as much as ten degrees, than in the more remote portions of the rooms, the hot air being introduced into the rooms at only one place, at the end of each room.

The judge gave no instructions to the jury on the question of satisfaction.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. Hemenway & F. L. Washburn, for the defendant.

S. Lincoln, for the plaintiff.

Holmes, J. The only question in this case is whether the written agreement between the parties left the right of the plaintiff to recover the price of the work and materials furnished by him dependent upon the actual satisfaction of the defendant. Such agreements usually are construed, not as making the defendant's declaration of dissatisfaction conclusive, in which case it would be difficult to say they amounted to contracts (Hunt *v.* Livermore, 5 Pick. 395, 397), but as requiring an honest expression. In view of modern modes of business, it is not surprising that in some cases eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved. Brown *v.* Foster, 113 Mass. 136; Gibson *v.* Cranage, 39 Mich. 49; Wood Reaping & Mowing Machine Co. *v.* Smith, 50 Mich. 565; Zaleski *v.* Clark, 44 Conn. 218; McClure Bros. *v.* Briggs, 58 Vt. 82; Exhaust Venti-

lator Co. *v.* Chicago, Milwaukee, & St. Paul Railway, 66 Wis. 218; Seeley *v.* Welles, 120 Penn. St. 69. Singerly *v.* Thayer, 108 Penn. St. 291; Andrews *v.* Belfield, 2 C. B. (N. S.) 779.[1]

Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant. Sloan *v.* Hayden, 110 Mass. 141, 143; Braunstein *v.* Accidental Death Ins. Co., 1 B. & S. 782, 799; Dallman *v.* King, 4 Bing. N. C. 105.

By the written proposition which was accepted by the defendant the plaintiff agrees, "in consideration of the sum of fifteen hundred and seventy-five dollars, to be paid me upon the satisfactory completion of the following system of heating . . . in your new mills, . . . to furnish and set up, . . . in complete and first-class working order," certain things. Then follow conditions, tests, and other undertakings. Then "it is further declared . . . that in the event of my not being able to properly heat every portion of the buildings . . . in accordance with the requirements as above set forth," upon ten days' notice "that the buildings are not properly and sufficiently heated, and I cannot so heat it in ten days thereafter," the plaintiff will remove the machines at his own expense. "In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of fifteen hundred and seventy-five dollars as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated."

The last words, "or the work demonstrated," offer an alternative to the owner's acknowledgment. They imply that, if the work is demonstrated, it is satisfactory within the meaning of the contract, although the owner has not acknowledged it. The previous words, "and conforming with all the requirements," tend the same way. The ten days' notice contemplated is not a notice that the owner is

[1] Andrews *v.* Belfield, 2 C. B. N. S. 779; Silsby Mfg. Co. *v.* Chico, 24 Fed. Rep. 893; Campbell Printing Press Co. *v.* Thorp, 36 Fed. Rep. 414; Hallidie *v.* Sutter St. Ry. Co. 63 Cal. 575; Goodrich *v.* Nortwick, 43 Ill. 445; Buckley *v.* Meidroth, 93 Ill. App. 460; Platt *v.* Broderick, 70 Mich. 577; Fire Alarm Co. *v.* Big Rapids, 78 Mich. 67; Housding *v.* Solomon, 127 Mich. 654; McCormick Machinery Co. *v.* Chesrown, 33 Minn. 32; Magee *v.* Scott Lumber Co., 78 Minn. 11; Gwynne *v.* Hitchner, 66 N. J. L. 97; Hoffman *v.* Gallaher, 6 Daly, 42; Tyler *v.* Ames, 6 Lans. 280; Gray *v.* Central R. R. Co., 11 Hun, 70; Moore *v.* Goodwin, 43 Hun, 534; Haven *v.* Russell, 34 N. Y. Supp. 292; Rossiter *v.* Cooper, 23 Vt. 522; McClure *v.* Briggs, 58 Vt. 82; Exhaust Ventilator Co. *v.* Chicago, &c. Ry. Co., 66 Wis. 218, 69 Wis. 454, *acc.*

dissatisfied, but that the buildings "are not being properly and sufficiently heated," and the right to give it is conditioned upon the plaintiff's "not being able to properly heat every portion of the buildings," etc. Taking these phrases with the test prescribed, that the system is "to readily as well as easily heat or raise the temperature at any point . . . to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced," etc., we are of opinion that the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant. *Exceptions overruled.*

CHARLES DOLL ET AL., RESPONDENTS, *v.* WILLIAM NOBLE, APPELLANT

NEW YORK COURT OF APPEALS, June 26–October 8, 1889

[*Reported in* 116 *New York,* 230]

BROWN, J. This action was brought to recover a balance due upon a written contract, by which the plaintiffs were to do polishing, staining, and rubbing on the woodwork of two houses owned by the defendant, and also for certain extra work upon the same houses. The defendant denied that the contract had been performed by the plaintiffs, or that anything was due from him.

The contract provided that the work was to be done "in the best workmanlike manner, under the supervision of William Packard, superintendent, and to the entire satisfaction of William Noble, the party of the first part, owner." The court submitted the case to the jury under a general charge, to which no exception was taken, and which in substance instructed the jury that "if the work under the contract was done in the best workmanlike manner, the plaintiffs would be entitled to recover, and that the defendant could not defeat such recovery by unreasonably, and in bad faith, saying the work was not done to his satisfaction;" that while the contract provided that it was to be done to the owner's satisfaction, that clause must be regarded as qualified by the other provisions of the contract that it was to be done in the best workmanlike manner; and that was the test of a correct and full performance of the contract.

The evidence was conflicting upon the question whether the work under the contract was done in a workmanlike manner, and also as to the extra work. The jury, however, found a verdict for the full amount claimed, and we must assume that the result was correct unless the court erred in its construction of the written agreement. While no exception was taken to the charge of the court to which I have referred, the defendant at the close of the charge requested

the court to instruct the jury that the defendant was entitled under the contract to have plaintiffs do the work "to his entire satisfaction before the plaintiffs became entitled to the final payment." To which the court responded, "I so charge, subject to the qualification which I have already made. He must not attempt to defeat a just claim by arbitrarily and unreasonably saying he is not satisfied. The work must be done according to the contract." To this ruling the defendant excepted, and this exception presents the principal question in the case.

The ruling of the court was correct. The question was directly presented in the case of Bowery National Bank *v.* Mayor, &c., 63 N. Y. 336. In that case the certificate of the "water purveyor" that the stipulations of the contract were performed was made a condition precedent to payment. It was conceded that the contract was completed and performed, but the "water purveyor" declined to give a certificate. The plaintiff was defeated in the Supreme Court, but in this court the judgment was reversed, the court saying, "It was necessary for them (the plaintiffs) either to prove upon the trial the making of such certificate, or to show that it was refused unreasonably and in bad faith. It was unreasonable to refuse it if it ought in the contemplation of the contract to be given. In such contemplation it ought to have been given, when, in any fact and beyond all pretence of dispute, the state of things existed to which the water purveyor was to certify, to wit, the full completion of the contract in each and every one of its stipulations."

That when the parties have made the certificate of a third person of the performance of the work a condition precedent to payment, such certificate must be produced or its absence explained is the general rule. Smith *v.* Briggs, 3 Denio, 74. But all the authorities recognize the exception that when such certificate is refused in bad faith or unreasonably the plaintiff may recover upon proof of performance of the contract. Smith *v.* Brady, 17 N. Y. 176; Thomas *v.* Fleury, 26 id. 26; Wyckoff *v.* Meyers, 44 id. 145; Nolan *v.* Whitney, 88 id. 648; United States *v.* Robeson, 9 Peters, 328; Smith *v.* Wright, 4 Hun, 652; Whiteman *v.* Mayor, &c., 21 id. 121.

The reason for the exception applies with much greater force where the work is to be done to the satisfaction of the party himself than to cases where the certificate of a third party is required. A party cannot insist on a condition precedent when he has himself defeated a strict performance. Butler *v.* Tucker, 24 Wend. 449.

In this case Judge Bronson well says: "The defendant does not set up that part of the covenant which requires the work to be done to *his* satisfaction. As to that it would probably be enough for the plaintiff to aver that the work was in all other respects completed in pursuance of the contract; for if the defendant was not satisfied with such a performance it would be his own fault." See also Duplex Safety Boiler Co. *v.* Gardner, 101 N. Y. 387.

None of the cases cited by the appellant hold a different rule. Many of them recognize the exception I have pointed out, and those that do not are easily distinguishable from the case under consideration. It is not deemed necessary to refer to them more specifically.

We have examined the other questions raised by the exceptions, but none of them are of sufficient importance to require discussion.

The judgment should be affirmed, with costs.

All concur. *Judgment affirmed.*[1]

WORK ET AL *v.* BEACH

NEW YORK SUPREME COURT, GENERAL TERM, March 13, 1891

[*Reported in* 13 *New York Supplement,* 678]

APPEAL from special term, New York County.

Action by Frank Work, William E. Strong, George Wood, and Frank K. Sturgis against Miles Beach. Defendant had had an account with plaintiffs, who were stock-brokers, arising out of purchases of stocks, and plaintiffs brought action against defendant, alleging that they had advanced more money than the value of the securities held by them. Pending the action, the plaintiff Sturgis and defendant had an interview, in which, after defendant had explained his embarrassed financial condition, Sturgis proposed that, if defendant would authorize plaintiffs in writing to sell the securities held by them and would then in writing admit the correctness of the debit balance on that account, and agree to pay that balance when he should be able to do so, plaintiffs would discontinue the action, would sell the securities, and would allow the account to stand until defendant should be able to pay such balance. To this the defendant agreed. Plaintiffs sold the securities, and sent defendant a final statement of his account, showing the amount due them as $14,570.68; and in their letter to him inclosing this statement, requested the agreed written acknowledgment. After some days defendant replied: "I have received your final statement of account, showing balance your due, in accordance with our agreement. To further complete compliance, I write to say that I will pay such balance when I shall be able to do so." Nearly three years thereafter plaintiffs made a demand on defendant for payment, and, no payment being made, brought this action. The original complaint contained no averment that defendant was then able to pay, and a demurrer thereto was sustained. See former decision, 6 N. Y. Supp. 27. The complaint was amended, and, on trial by the court, a jury having

[1] Fuchs & Lang Mfg. Co. *v.* Kittredge, 242 Ill. 88; Schmand *v.* Jandorf, 175 Mich. 88; Boyd *v.* Hallowell, 60 Minn. 225; Barnett *v.* Sweringen, 77 Mo. App. 64; Hummel *v.* Stern, 164 N. Y. 603; Richeson *v.* Mead, 11 S. Dak. 639, *acc. Cf.* Crawford *v.* Mail & Express Pub. Co. 163 N. Y. 404; Diamond *v.* Mendelsohn, 156 N. Y. App. D. 636.

been waived, it appeared that defendant, at the time the promise to pay was given, and continuously since that time, received a salary as judge of $1,250 per month, out of which he saved nothing. Judgment was rendered for defendant, dismissing the complaint. See decision, 12 N. Y. Supp. 12. From this judgment plaintiffs appeal.[1]

Argued before VAN BRUNT, P. J., and DANIELS and O'BRIEN, JJ.

Henry S. Bennett, for appellants.

Augustus C. Brown, for respondent.

O'BRIEN, J. [after stating that the action was not on the original debt, but on the conditional promise to pay it, and stating some authorities said]:

It may fairly be deduced from the cases that the plaintiffs were bound to prove the defendant's ability to pay at the commencement of the action, and that such ability could be shown by circumstances as well as by direct evidence. Beyond this there is no fixed rule. Each case must depend upon the terms of the contract, read in the light of the surrounding circumstances. Substantial proof of ability within the intent and meaning of the parties must be given; and, although that proof may, in the nature of things, be difficult, it is none the less requisite. By taking a conditional obligation — the condition itself being founded upon a valuable consideration — the obligee accepts the burden imposed upon him of establishing the fulfilment of the condition before he can recover. . . . The understanding undoubtedly was that the defendant should be required to pay only when his circumstances were changed for the better, either by an acquisition of fortune or a decrease of obligation." 12 N. Y. Supp. 16. It was therefore correctly ruled that it was incumbent on plaintiffs to show some change for the better in defendant's circumstances at a period subsequent to the time when the promise was given. Such a construction, finding support, as it does, both upon principle and authority, was given to the contract between the parties upon the trial. No evidence was presented to warrant the conclusion that defendant's circumstances had improved, or showing his ability to pay. He was in receipt of his salary as judge when the contract was made. He received it then, as now, monthly; and the testimony shows that out of it he saved nothing. It is useless to speculate as to what defendant could or should have done; the question being, did the plaintiffs prove defendant's ability to respond within the meaning of the contract? The conclusion reached was justified by the proof.[2]

[1] The statement of facts is abbreviated.

[2] Cole *v.* Saxby, 3 Esp. 159; Davies *v.* Smith, 4 Esp. 36; Tell City Co. *v.* Nees, 63 Ind. 245; Stainton *v.* Brown, 6 Dana, 249; Eckler *v.* Galbraith, 12 Bush, 71; Denney *v.* Wheelwright, 60 Miss. 733; Everson *v.* Carpenter, 17 Wend. 419; Re Knab, 78 N. Y. Supp. 292; Nelson *v.* Von Bonnhorst, 29 Pa. 352; Salinas *v.* Wright, 11 Tex. 572, *acc.*

Kincaid *v.* Higgins, 1 Bibb, 396, *contra.* See also Nunez *v.* Dautel, 19 Wall. 562; Works *v.* Hershey, 35 Ia. 340; De Wolf *v.* French, 51 Me. 420; Crooker *v.* Holmes, 65 Me. 195; Lewis *v.* Tipton, 10 Ohio St. 88; Noland *v.* Bull, 24 Oreg. 479.

MERCANTILE TRUST COMPANY *v.* HENSEY

SUPREME COURT OF THE UNITED STATES, March 15–April 8, 1907

[*Reported in* 205 *United States,* 298]

THIS was a writ of error to the Court of Appeals of the District of Columbia, to review a judgment against the Mercantile Trust Company on a bond executed by the Company as surety for one Jones in a building contract which he had entered into with the defendant in error. The builder's compensation was made conditional upon his receiving an architect's certificate, and this certificate he duly obtained, but the defendant in error, asserting that nevertheless the work was improperly done, brought this action.

MR. JUSTICE PECKHAM: We do not think this certificate was conclusive, and it did not, therefore, bar the maintenance of this action. The language of the contract, upon which the claim is based, is set out in the foregoing statement, and while it provides that the work shall be completed agreeably to the drawings and specifications made by M. D. Hensey, architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him, it omits any provision that the certificates shall be final and conclusive between the parties. In other words, the contract provides that before the builder can claim payment at all he must obtain the certificate of the architect; but after such certificate has been given, there is no provision which bars the plaintiff from showing a violation of the contract in material parts, by which he has sustained damage. A contract which provides for the work on a building to be performed in the best manner and the materials of the best quality, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive, and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications. Glacius *v.* Black, 50 N. Y. 145; Fontano *v.* Robbins, 22 App. D. C. 253.

There is also in the contract the provision in regard to payments

In Denney *v.* Wheelwright, 60 Miss. 733, 744, the court said: "The fault of [the instruction] given for the plaintiffs is that it required the defendants to prove not only that the condition had happened upon which the promises of the plaintiffs became absolute, but that it continued up to the commencement of the suit. If the promise of the plaintiffs was to pay these notes when or if they became able, then when they became able the promise became absolute, and a right of action existed in favor of the defendants which would not be lost by the subsequent insolvency or inability of the plaintiffs to pay the debt. The question was not whether the plaintiffs were at the institution of their suit able to pay the debts, but whether at any time after their promise it became absolute by the happening of the condition."

See also Waters *v.* Thanet, 2 Q. B. 757.

as the work progressed, which showed that a certificate was to be obtained from and signed by the architect in charge, before the contractor was entitled to payment, but it was provided that the certificate should "in no way lessen the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications either in execution or materials." There is the further positive agreement of the contractor to execute and complete all the work as set forth in the specifications in the best and most workmanlike manner, and also that final payment is to be made only when the houses are completed in accordance with the agreement and the plans and specifications prepared therefor.

The whole contract shows, in our opinion, that the certificate that the houses had been completed according to the contract and its plans and specifications was not to be conclusive of the question, and the plaintiff was not thereby precluded from showing that in fact the contractor had not complied with his contract, and the plaintiff had thereby sustained damage.

The cases in the opinion of the court below, Fontano *v.* Robbins, 22 App. D. C. 253; Bond *v.* Newark, 19 N. J. Eq. 576; Memphis etc. R. Co. *v.* Wilcox, 48 Pa. St. 161; Adlard *v.* Muldoon, 15 Ill. 193, are in substance to this effect. To make such a certificate conclusive requires plain language in the contract. It is not to be implied. Central Trust Co. *v.* Louisville etc. R. Co. 70 Fed. Rep. 282, 284. The cases of Sweeney *v.* United States, 109 U. S. 618; Martinsburg etc. Railroad Co. *v.* March, 114 U. S. 549 Chicago etc. Railroad Co. *v.* Price, 138 U. S. 185; Sheffield etc. R. R. Co. *v.* Gordon 151 U. S. 285, were all cases in which the contract itself provided that the certificate should be final and conclusive between the parties. *Affirmed.*[1]

ELLEN REAGAN, Administratrix *v.* UNION MUTUAL LIFE INSURANCE CO.

Supreme Judicial Court of Massachusetts, October 25–December 1, 1905

[*Reported in* 189 *Massachusetts,* 555]

Knowlton, C. J. This is an action of contract on a policy of life insurance issued to the plaintiff's intestate. The defendant answered that the policy was obtained by fraud of the insured. The policy contains a clause as follows: "*Incontestability.* This policy is incontestable from date of issue for any cause, except non-payment of premium." The defendant then offered to prove that the insured made material false and fraudulent representations be-

[1] The statement of facts is abbreviated and a portion of the opinion omitted.

fore the issuing of the policy, and the only question raised is whether the evidence of such fraud is admissible in defense under such a policy.

This is not like the numerous cases in which the policy provides that it shall be incontestable for fraud after the expiration of a specified time, which is not unreasonably short. It has often been held that a provision of that kind is valid because it is in the nature of a limitation of the time within which the defendant may avoid the policy for this cause. Such a provision is reasonable and proper, as it gives the insured a guaranty against possible expensive litigation to defeat his claim after the lapse of many years, and at the same time gives the company time and an opportunity for investigation, to ascertain whether the contract should remain in force. It is not against public policy, as tending to put fraud on a par with honesty. Wright *v.* Mutual Benefit Assoc. 118 N. Y. 237. Vetter *v.* Massachusetts National Assoc. 29 App. Div. (N. Y.) 72. Clement *v.* New York Ins. Co. 101 Tenn. 22. Goodwin *v.* Provident Assur. Assoc. 97 Iowa, 226, 234. Kline *v.* National Benefit Assoc. 111 Ind. 462. Murray *v.* State Ins. Co. 22 R. I. 524. Royal Circle *v.* Achterrath, 204 Ill. 549. But this clause purports to make the policy incontestable for any cause, from the date of issue. We must assume that the defendant issued the policy on the faith of the fraudulent representations, without discovering the fraud, or, so far as appears, having any opportunity to discover it before the contract was made. It is true that it might have declined to issue a policy until it should take time to investigate the matters represented. If it had postponed making the contract for a considerable time, and had investigated the subjects to which the representations related, and had then issued a policy, inserting in it a provision that, having made an examination of the material matters stated by the insured, it was so far convinced of the truth of his statements that it would waive its rights afterwards to set up fraud as a defence to the claim, a different question would have been presented. It then might appear that the contract was not induced by reliance upon fraudulent representations, but by an investigation which the defendant conducted, on which it relied. There is nothing to show that the policy was not issued immediately upon the receipt by the company of the report containing the false statement. The company was not bound to postpone the making of the contract. It had a right to enter into it, relying upon the report which was founded on the false representations.

Will the court enforce an agreement never to set up fraud in defence to a contract, when the contract is made in reliance upon material representations that may be true or false? This question has been considered in its application to contracts of insurance. In Wheelton *v.* Hardisty, 8 El. & Bl. 232, 283, Lord Campbell interpreted a provision that a contract should be indefensible, as meaning

indisputable, "subject to the implied exception of personal fraud which will vitiate every contract." In Massachusetts Benefit Assoc. *v.* Robinson, 104 Ga. 256, the court said, "A policy providing generally that it should be incontestable from its death, but silent on the subject of defending upon grounds originating in fraud, would still be a valid contract; the waiver of the right to defend on the ground of fraud not being the subject of express stipulation, the law would imply that the insurer intended to reserve to himself the right to defend upon that ground. If, however, the policy stipulated that it should be incontestable from its date, and the insurer should not be allowed any defences, whether originating in fraud or otherwise; or if it were clear from the terms of the contract that it was the intention of the parties that fraud should not be defence, then such a contract would be void as being opposed to the policy of the law." In Welch *v.* Union Central Ins. Co. 108 Iowa, 224, 230, substantially the same doctrine is clearly stated. To the same effect is Bliss on Ins. (1st ed.) § 247, (2d ed.) §§ 254, 255. All the cases in the first group of the above citations discuss the incontestability of policies, after the lapse of a specified time, upon grounds that imply the existence of the same rule of law.

The reasons for the enforcement of such a rule are particularly strong when one of the contracting parties is a mutual insurance company, all the members of which share in the profits and losses.

There are various cases which forbid companies to make contracts of life insurance that are against the policy of the law. In Ritter *v.* Mutual Ins. Co. 169 U. S. 139, it was held that a contract to insure one against suicide would be against public policy. Mr. Justice Harlan, in the opinion, said, "A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment." An agreement to be bound by a contract which the parties are making, in spite of subsequently discovered fraud by which it was obtained, would be subversive of sound morality. In Hatch *v.* Mutual Ins. Co. 120 Mass. 550, this court held that there could be no recovery under a policy of life insurance when the insured knowingly and voluntarily exposed her life by submitting to a criminal operation which proved fatal. For similar decisions see Amicable Society *v.* Bolland, 4 Bligh (N. S.) 194, and Burt *v.* Union Central Ins. Co. 187 U. S. 362.

We have been referred to no decision which holds valid a provision that a policy of life insurance shall be incontestable for fraud from the day of its date. The only case that we have discovered in which there is any language looking in that direction is Patterson *v.* Natural Premium Ins. Co. 100 Wis. 118, and in that the ground of the decision, as we understand it, is that there was no evidence on which to raise the question. *Verdict set aside.*[1]

[1] A portion of the opinion is omitted.

LUMBER UNDERWRITERS OF NEW YORK *v.* RIFE

SUPREME COURT OF THE UNITED STATES, May 13–June 1, 1915

[*Reported in* 237 *United States,* 605]

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit upon a policy insuring lumber for one year from May 22, 1909. The policy contained a warranty by the assured that a continuous clear space of one hundred feet should be maintained between the lumber and the mill of the assured and also a provision requiring any waivers to be written upon or attached to the instrument. The lumber was burned during the year, but it appeared by the undisputed evidence that the warranty had been broken and the judge directed a verdict for the defendants. It appeared, however, that the policy was endorsed "No. 27868 Renewing No. 27566," and the plaintiffs offered to prove that pending the earlier policy the defendants had the report of an inspection that informed them of the actual conditions, showing permanent structures between where some of the lumber was piled and the mill, that made the clear space in this direction less than one hundred feet, and that with that knowledge they issued the present policy and accepted the premium. This evidence was excluded subject to exception. But it was held by the Circuit Court of Appeals that the jury should have been allowed to find whether the defendants had knowledge of the conditions and reasonable expectation that they would continue and so had waived the warranty. For this reason the judgment was reversed. 204 Fed. Rep. 32; 122 C. C. A. 346.

When a policy of insurance is issued, the import of the transaction, as every one understands, is that the document embodies the contract. It is the dominant, as it purports to be the only and entire expression of the parties' intent. In the present case this fact was put in words by the proviso for the endorsement of any change of terms. Therefore when by its written stipulation the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received. Northern Assurance Co. *v.* Grand View Building Association, 183 U. S. 308. Northern Assurance Co. *v.* Grand View Building Association, 203 U. S. 106, 107. Connecticut Fire Ins. Co. *v.* Buchanan, 141 Fed. Rep. 877, 883. See Penman *v.* St. Paul Fire & Marine Ins. Co., 216 U. S. 311. Ætna Life Ins. Co. *v.* Moore, 231 U. S. 543, 559. There is no hardship in this rule. No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. The assured also

knows better than the insurers the condition of his premises, even if the insurers have been notified of the facts. If he brings to the making of his contract the modest intelligence of the prudent man he will perceive the incompatibility between the requirement of one hundred feet clear space and the possibilities of his yard, in a case like this, and will make a different contract, either by striking out the clause or shortening the distance, or otherwise as may be agreed. The distance of one hundred feet that was written into this policy was not a fixed conventional formula that there would be trouble in changing, if the insured would pay what more, if anything, it might cost. Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument asks to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.

The plaintiffs try to meet these recognized rules by the suggestion that after a contract is made a breach of conditions may be waived, void only meaning voidable at the option of the insurers; Grigsby *v.* Russell, 222 U. S. 149, 155; that this policy was a renewal of a former one, and that the case stands as if, after the breach of warranty had been brought to the notice of the insurers, a premium had been paid and accepted without a new instrument. But what would be the law in the case supposed we need not consider as in our opinion it is not the one before us. The policy in suit is a document complete in itself. The endorsement that we have quoted is probably only for history and convenient reference. We see no ground for attributing to it any effect upon the contract made. The fact that the policy has a provision for renewal has no bearing, and we do not perceive how it would matter if the previous one had the same. No use was made of the clause. Therefore in our opinion the principles that we have laid down apply to the present case, Kentucky Vermillion Mining & Concentrating Co. *v.* Norwich Union Fire Ins. Soc., 146 Fed. Rep. 695, 700, and the action of the District Court was right.

Judgment reversed.

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE DAY are of the opinion that the Circuit Court of Appeals properly disposed of the case, and dissent.

PANOUTSOS *v.* RAYMOND HADLEY CORPORATION OF NEW YORK

IN THE COURT OF APPEAL, June 13, 14, 1917

[*Reported in* [1917] 2 *K. B.* 473]

BY a contract in writing the Raymond Hadley Corporation agreed to sell to Panoutsos 4000 tons of flour. The contract contained this clause, "Cash against Documents in New York. Payment by confirmed bankers' credit."

A credit was opened but it was not irrevocable and therefore was not "a confirmed bankers' credit." The sellers, however, made several shipments in part fulfilment of the contract on October 21, and again on October 27, 28, 29 and 30, for which they were duly paid by the New York bank in pursuance of the credit established. Meanwhile, on October 27th they took exception to the character of the credit. On November 15th they requested the buyer to extend the time for shipment from November 7th to November 30th, and to this the buyer agreed. On November 25th, the sellers notified the buyer that because of the lack of a confirmed credit the remainder of the contract was cancelled. The buyer refused to accept the cancellation and the dispute was referred to arbitration. The arbitrators found in favor of the buyer and the question for the opinion of the Court is whether or not there was any evidence on which the arbitrators could properly find that the sellers had waived the term in the contract that payment should be by confirmed bankers' credit.

VISCOUNT READING, C. J. It was admitted that there was no confirmed bankers' credit, but the buyer contended that there had been a waiver of that condition of the contract. In answer to that the sellers said that there had been no such waiver, and if there had been a waiver that they were entitled at any time to insist upon the condition being performed. The buyer replied that no doubt the sellers were entitled to insist upon the performance of the condition, but that, having waived its performance hitherto, they must give reasonable notice to the buyer of their intention to insist upon its performance in the future so as to give him an opportunity of putting the credit right. Bailhache J. held that the sellers must be taken to have waived the performance of the condition, that the buyer was entitled to reasonable notice, and that such notice had not in fact been given. He therefore answered the question in favor of the buyer.

In my opinion the learned judge was right. It is open to a party to a contract to waive a condition which is inserted for his benefit. If the sellers chose to ship without the safeguard of a confirmed bankers' credit, they were entitled to do so, and the buyer performed his part of the contract by paying for the goods shipped, though

there was no confirmed bankers' credit, inasmuch as that condition had been waived. If at a later stage the sellers wished to avail themselves of the condition precedent, in my opinion there was nothing in the facts to prevent them from demanding the performance of the condition if they had given reasonable notice to the buyer that they would not ship unless there was a confirmed bankers' credit. If they had done that and the buyer had failed to comply with the condition, the buyer would have been in default, and the sellers would have been entitled to cancel the contract without being subject to any claim by the buyer for damages.

In Bentsen *v.* Taylor, Sons & Co.[1] Bowen L. J. stated the law as to waiver thus: "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent?" Reading sellers for defendants and buyers for plaintiff in that passage, it applies exactly to the present case. The sellers did lead the buyer to think so, and when they intended to change that position it was incumbent on them to give reasonable notice of that intention to the buyer so as to enable him to comply with the condition which up to that time had been waived.

The case of *In re* Tyrer & Co. and Hessler & Co.[2] was cited as an authority for the proposition that the moment the sellers chose to avail themselves of the failure to perform the condition precedent they could put an end to the contract without giving the buyer an opportunity of remedying the default which had hitherto been waived. That case is not an authority for that proposition. It shows that, where there are stipulated times in a charter party for payment of the hire of a ship and a power to withdraw the ship if the payment is not made at the stipulated time, the mere fact that there has been default in payment at one or more stipulated times, of which advantage has not been taken, does not entitle the party in default at a subsequent time to a notice so as to enable him to comply with the condition before the right to withdraw arises. That is a totally different case from the present. I cannot find any authority to support the proposition that, when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-mentioned party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract. It seems to me to follow from the observations of Bowen L. J. in Bentsen *v.* Taylor, Sons & Co.[3] that there must be reasonable notice given to the buyer before the sellers can take advantage of the

[1] [1893] 2 Q. B. 283.
[2] 6 Com. Cas. 143; 7 Com. Cas. 166.
[3] [1893] 2 Q. B. 283.

failure to provide a confirmed bankers' credit. That is the decision of Bailhache J.[1]

Lord Cozens-Hardy, M. R., and Scrutton, L. J., agreed.

Appeal dismissed.

NELLIE FOX, Appellant, *v.* L. H. GRANGE, Appellee

Illinois Supreme Court, December 17, 1913

[*Reported in* 261 *Illinois,* 116]

On July 20, 1907, the Appellee agreed to sell certain real estate to the appellant, the price of $1100 being payable in instalments, $200 immediately and thereafter $15 on the first of each month until the entire sum with 6% interest was paid. It was provided that time was of the essence, and in case of the appellant's failure to make any part of the payments the contract should, at the appellee's option, be terminated and all payments previously made should be forfeited. The appellee agreed to remove a mortgage on the land, and this had not been done. The appellee accepted payments in amounts and at times not in accordance with the contract. During 1912 the appellee told the appellant several times that she had allowed things to drag along and that he was going to take the property from her unless she made her payments.

On July 9th, 1912, the appellee served a notice demanding immediate possession, and, two days after, began an action of forcible entry and detainer. The appellant's attorney thereupon made a tender of the amount supposed to be due to the appellee. The tender was refused on the ground that it was too late, and the appellant then filed this bill in equity asking a conveyance on payment of the amount ascertained to be due. The bill was dismissed for want of equity, and Mrs. Fox appealed.

Mr. Justice Cartwright. By the terms of the contract time of payment was of the essence of the agreement, and a forfeiture was provided for if Mrs. Fox should fail to make either of the payments or any part thereof, or to perform any of the covenants on her part. The parties were competent to contract and the agreement was lawful, and if it was in force according to its terms at the time the forfeiture was declared, a court of equity would not relieve Mrs. Fox from the consequences. Grange, however, might waive the provision of the contract as to time of payment, and a habit of accepting payments of a less amount or after the time stipulated is one of the usual ways of waiving such a provision. Whether a provision of that kind is waived depends upon the facts of the particular case, and it does not necessarily follow that there has been a waiver merely

[1] The statement of facts if abbreviated and a portion of the opinion in which it was held that the notice given by the sellers was unreasonable is omitted.

because some payments are accepted after they are due. (Phelps *v.* Illinois Central Railroad Co. 63 Ill. 468.) The parties to the contract might waive or temporarily suspend the agreement by their conduct, and if there was such a course of conduct on the part of Grange as to show that the provisions had been waived or suspended it could only be restored upon definite and specific notice. (Monson *v.* Bragdon, 159 Ill. 61; Eaton *v.* Schneider, 185 id. 508; Kissack *v.* Bourke, 224 id. 352.) That there was a waiver in this case cannot be doubted. On the very day of making the contract the cash payment was $30 less than the amount agreed upon, and for nearly five years there was never a payment which equaled the amount due. Perhaps it would not be just to Grange to deny him the right to reinstate or restore the waived provision, but a court of equity ought not to permit him to do it except upon definite and specific notice which Mrs. Fox would understand and under circumstances of perfect fairness on his part. The question would be whether Grange, having waived the provision by a course of conduct extending over nearly five years, could again put it into operation by demanding the whole amount at once and when he had not removed the encumbrance or offered to do so. It is, of course, manifest that a woman who worked for her living and was out of work would be unable to raise the amount due except by encumbering the lot, and she could only do that with a title clear. Grange had been threatening her for a year but had done nothing toward the execution of his threats, and it appears to us that Mrs. Fox had a right to suppose what he said before attempting a forfeiture was of the same character. We think it would violate the principles on which courts of equity act, to permit forfeiture under such circumstances.

The amount tendered by the attorney was $536.27 and at the hearing it appeared that the amount due when the tender was made was $567. Grange refused to take the money, not because of the amount, but because he had determined to stand on his legal rights under the forfeiture. The attorney was ready and willing to pay what might be due, which was difficult of ascertainment, and Grange absolutely refused to have anything to do with him. As Grange made no objection to the amount tendered and his refusal was upon another ground the offer was sufficient as a basis for the bill. There were also objections to some other matters connected with the tender, but as Grange was insisting upon the forfeiture and denying to Mrs. Fox any right whatever, he could not take advantage, in a court of equity, of objections which he might have made but did not point out.

The decree is reversed and the cause remanded.

Reversed and remanded.[1]

[1] The statement of facts is abbreviated, and a portion of the opinion omitted.

B. — Conditions Subsequent

WILLIAM GRAY *v.* OLIVER GARDNER and Others

Supreme Judicial Court of Massachusetts, March Term, 1821

[*Reported in* 17 *Massachusetts Reports,* 188]

Assumpsit on a written promise to pay the plaintiff $5,198.87, with the following condition annexed, viz.: "On the condition that if a greater quantity of sperm oil should arive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places in whaling vessels on or within the same term of time the last year, then this obligation to be void." Dated April 14, 1819.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note, unconditional, had been given by the defendants for the value of the oil, estimated at sixty cents per gallon; and the note in suit was given to secure the residue of the price, estimated at eighty-five cents, to depend on the contingency mentioned in the said condition.

At the trial before the Chief Justice, the case depended upon the question whether a certain vessel, called the Lady Adams, with a cargo of oil, arrived at Nantucket on the first day of October, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants; and further that, although the vessel might have, within the time, gotten within the space which might be called Nantucket Roads, yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October, in order to have arrived within the meaning of the contract.

The opinion of the Chief Justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had; otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

Whitman, for the defendants. As the evidence at the trial was contradictory, the question on whom the burden of proof rested became important. We hold that it was on the plaintiff. This was a condition precedent. Until it should happen, the promise did not take effect. On the non-occurrence of a certain contingent event, the promise was to be binding, and not otherwise. To entitle himself to enforce the promise, the plaintiff must show that the contingent event has not actually occurred.

On the other point saved at the trial, the defendants insist that it

was not required by the terms of this contract that the vessel should be moored. It is not denied that such would be the construction of a policy of insurance containing the same expression. But every contract is to be taken according to the intention of the parties to it, if such intention be legal and capable of execution. The contemplation of parties to a policy of insurance is, that the vessel shall be safe before she shall be said to have arrived. So it is in some other maritime contracts. But in that now in question, nothing was in the minds of the parties, but that the fact of the arrival of so much oil should be known within the time limited. The subject-matter in one case is safety, in the other it is information only. In this case the vessel would be said to have arrived, in common understanding, and according to the meaning of the parties.

F. C. Gray, for the plaintiff.

PARKER, C. J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event, viz., the arrival of a certain quantity of oil, at the specified places, in a given time. It is like a bond with a condition: if the obligor would avoid the bond, he must show performance of the condition. The defendants, in this case, promise to pay a certain sum of money, on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them; and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before twelve o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor, or is moored. She may sink, or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance; and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it. *Judgment on the verdict.*

MOODY *v.* INSURANCE COMPANY

OHIO SUPREME COURT, October 16, 1894

[*Reported in* 52 *Ohio State,* 12]

WILLIAMS, J.[1] The policy of insurance upon which the plaintiff sought to recover in the action below, provides, among its many conditions, that "no liability shall exist under this policy for loss or

[1] A portion of the opinion is omitted.

damage in or on vacant or unoccupied buildings, unless consent for such vacancy or non-ocupancy be indorsed hereon." The answer alleges that the house insured by the policy was burned while it was unoccupied; and, though that allegation was denied, the court required the plaintiff to take the burden of proving that the building was occupied. That action of the court is assigned for error, and presents the first question for consideration.

The court went upon the theory that the provision of the policy above quoted constitutes a condition precedent, the performance of which was put in issue by the denial of the averments of the petition. In an action on a policy of fire insurance the plaintiff may plead generally, as was done in this case, the due performance of all the conditions precedent, on his part. and when the allegation is controverted the burden is undoubtedly upon him to show such performance. But we do not understand the clause of the policy in question to be a condition of that kind. An unexpired policy of fire insurance, which has been regularly issued, and remains uncancelled, must, in the absence of a showing to the contrary, be regarded as a valid and effective policy, upon which the assured is *prima facie* entitled to recover when the loss occurs, and the steps necessary to establish it have been taken; and hence, the conditions precedent in such a policy include only those affirmative acts on the part of the assured, the performance of which is necessary in order to perfect his right of action on the policy, such as giving notice and making proof of the loss, furnishing the certificate of a magistrate when required by the terms of the policy, and, it may be, in some cases, other steps of a like nature. Those clauses usually contained in policies of insurance, which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing, or omission to do some act, are not in any proper sense conditions precedent. If they may be properly called conditions, they are conditions subsequent, and matters of defence, which, together with their breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defence, if controverted, is, of course, upon the party pleading it. This precise question has not heretofore received the consideration of this court, but it has been raised in other states under various clauses of insurance policies. In the case of Lounsbury *v.* Insurance Co., 8 Conn. 459, the question was presented in an action on a policy of fire insurance which provided "that the insurers would not be liable for loss or damage, happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; also, that if the building insured should be used, during the term of insurance, for any occupation, or for the purpose of storing therein any goods, denominated hazardous or extrahazardous in the conditions annexed to the policy (unless otherwise

specially provided for), the policy should cease and have no effect." It was held, these were not conditions precedent to the plaintiff's right of recovery, but were matters of defence to be taken advantage of by pleading. The court in that case say: "All these conditions, if such they may be called, are inserted in the policy by way of proviso, and not at all as conditions precedent. They are introduced for the benefit of the defendants; and they must be taken advantage of, if at all, by pleading." In Newman *v.* Insurance Co., 17 Minn. 123, it is held that: "Under a stipulation in a policy, that if the risk be increased by any means whatever, within the control of the insured, the insurance shall be void, the assured is not to plead and prove, affirmatively, that it has not been thus increased, but if it has, it is a matter of defence to be alleged and proved by defendant." And in Daniels *v.* Insurance Co., 12 Cush. 426, Chief Justice Shaw lays down the rule in general terms, that if the insurers rely "either upon the falsity of a representation, or the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact for the jury, in either aspect."

The following among other cases hold the same doctrine: Insurance Co. *v.* Carpenter, 4 Wis. 20; Mueller *v.* Insurance Co., 45 Mo. 84; Insurance Co. *v.* Crunk, 91 Tenn. 376; Spencer *v.* Insurance Association, 37 N. E. Rep. 617; Insurance Co. *v.* Sisk, 36 N. E. Rep. 659.

Any other rule would be highly inconvenient, if not impracticable. The clause of the policy under which the defendant sought to be relieved from liability is but one of a great number of conditions, for the violation of any of which the insurer might also claim to be relieved; and if the issue raised by the denial that the plaintiff performed all the conditions precedent on his part, imposed upon him the burden of proving there had been no violation of that particular clause, it also imposed upon him the burden of proving there was no breach of either of the other conditions, and for want of such proof as to either, he must fail, although in fact neither was the subject of any real controversy. This would be an unreasonable requirement, not only operating as a hardship on the plaintiff, but in most cases unnecessarily prolonging the trial. Especially should the rule be as we have stated it, under our code system of pleading, a prominent object of which to so simplify the issues, that the evidence might be confined to the real matter of dispute, thus expediting the trial of causes and facilitating the business of the courts. The vacancy, or want of occupancy of a building is as much an affirmative fact as its occupancy, and as capable of proof; and the burden upon the subject, under the issues in this case, was, we think, upon the defendant.

SEMMES *v.* HARTFORD INSURANCE COMPANY

SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1871

[*Reported in* 13 *Wallace,* 158]

IN error to the Circuit Court for the District of Connecticut.

Semmes sued the City Fire Insurance Company, of Hartford, in the court below, on the 31st of October, 1866, upon a policy of insurance, for a loss which occurred on the 5th day of January, 1860. The policy as declared on showed as a condition of the contract, that payment of losses should be made in sixty days after the loss should have been ascertained and proved.

The company pleaded that by the policy itself it was expressly provided that no suit for the recovery of any claim upon the same should be sustainable in any court unless such suit should be commenced within the term of twelve months next after any loss or damage should occur; and that in case any such suit should be commenced after the expiration of twelve months next after such loss or damage should have occurred, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And that the plaintiff did not commence this action against the defendants within the said period of twelve months next after the loss occurred.

To this plea there were replications setting up, among other things, that the late civil war prevented the bringing of the suit within the twelve months provided in the condition, the plaintiff being a resident and citizen of the State of Mississippi and the defendant of Connecticut during all that time.

The plea was held by the court below to present a good bar to the action, notwithstanding the effect of the war on the rights of the parties.

That court, in arriving at this conclusion, held, first, that the condition in the contract, limiting the time within which suit could be brought, was, like the statute of limitation, susceptible of such enlargement, in point of time, as was necessary to accommodate itself to the precise number of days during which the plaintiff was prevented from bringing suit by the existence of the war. And ascertaining this by a reference to certain public acts of the political departments of the government, to which it referred, found that there was, between the time at which it fixed the commencement of the war and the date of the plaintiff's loss, a certain number of days, which, added to the time between the close of the war and the commencement of the action, amounted to more than the twelve months allowed by the condition of the contract.

Judgment being given accordingly in favor of the company the plaintiff brought the case here.

The point chiefly discussed here was when the war began and when it ceased; Mr. *W. Hamersley,* for the plaintiff in error, contending that the court below had not fixed right dates, but had fixed the commencement of the war too late and its close too early, and he himself fixing them in such a manner as that even conceding the principle asserted by the court to be a true one, and applicable to a contract as well as to a statute of limitation, the suit was still brought within the twelve months.

The counsel, however, denied that the principle did apply to a contract, but contended that the whole condition had been rendered impossible and so abrogated by the war, and that the plaintiff could sue at any time within the general statutory term, as he now confessedly did.

Mr. *R. D. Hubbard,* contra.

Mr. Justice MILLER delivered the opinion of the court.

It is not necessary, in the view which we take of the matter, to inquire whether the Circuit Court was correct in the principle by which it fixed the date, either of the commencement or cessation of the disability to sue growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit does not open and expand itself so as to receive within it three or four years of legal disability created by the war and then close together at each end of that period so as to complete itself, as though the war had never occurred.

It is true that, in regard to the limitation imposed by statute, this court has held that the time may be so computed, but there the law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication, take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit by a judicial construction of law which deprived him of the right to sue yet permitted the statute to run until it became a complete bar, or else, holding the statute under the circumsances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was therefore necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that a plaintiff shall have twelve months from the time his cause of action accrued to commence suit, but twelve months from the time of loss; yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the time of twelve months next after the loss shall occur, and in case such action shall be commenced after

the expiration of twelve months next after such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. Now, this contract relates to the twelve months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So also if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumptions of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixe by the legislative authority, that is, by the statute of limitations.

We have no doubt that the disability to sue imposed on the plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim. That part of the contract, therefore, presents no bar to the plaintiff's right to recover.

As the Circuit Court founded its judgment on the proposition that it did, the judgment must be

Reversed and the case remanded for a new trial.[1]

[1] See also New York Life Ins. Co. *v.* Statham, 93 U. S. 24; Thompson *v.* Phenix Ins. Co., 136 U. S. 287; Steel *v.* Phenix Ins. Co., 51 Fed. Rep. 715 (C. C. A.); Jackson *v.* Fidelity Co., 75 Fed. Rep. 359 (C. C. A.); Earnshaw *v.* Sun Mut. Aid Soc., 68 Md. 465; Eliot Nat. Bank *v.* Beal, 141 Mass. 566; Mutual Benefit Life Ins. Co. *v.* Hillyard, 37 N. J. L. 444.

SECTION II

IMPLIED CONDITIONS AND EFFECTS OF THE PLAINTIFF'S FAILURE TO PERFORM HIS PROMISE

ANONYMOUS

IN THE KING'S BENCH, TRINITY TERM, 1500

[*Reported in Year Book,* 15 *Henry VII, folio* 10 *b, placitum* 7]

NOTA PER FINEUX, C. J. If one covenant with me to serve me for a year, and I covenant with him to give him 20*l.*, if I do not say for said cause, he shall have an action for the 20*l.* although he never serves me; otherwise, if I say he shall have 20*l.* for said cause. So if I covenant with a man that I will marry his daughter, and he covenants with me to make an estate to me and his daughter, and to the heirs of our two bodies begotten; though I afterwards marry another woman, or his daughter marry another man; yet I shall have an action of covenant against him, to compel him to make this estate; but if the covenant be that he will make the estate to us two for said cause, then he shall not make the estate until we are married. And such was the opinion of the Court. And REDE, J., said it was so without doubt.

BROCAS' CASE

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1588

[*Reported in* 3 *Leonard,* 219]

BROCAS, lord of a manor, covenanted with his copyholder to assure to him and his heirs the freehold and inheritance of his copyhold. And the said copyholder, in consideration of the same performed, covenanted to pay such a sum. It was the opinion of the whole Court, that the said copyholder is not tied to pay the said sum before the assurance made and the covenant performed. But if the words had been, *in consideration of the said covenant to be performed,* then he is bounden to pay the money presently, and to have his remedy over by covenant.

NICHOLS *v.* RAYNBRED

HILARY TERM, 1615

[*Reported in Hobart,* 88]

NICHOLS brought an assumpsit against Raynbred, declaring that, in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings. Adjudged for the plaintiff in both courts, that the plaintiff needed not to aver the delivery of the cow, because it is promise for promise.[1] Note, here the promises must be at one instant, for else they will be both *nuda pacta.*

PORDAGE *v.* COLE

IN THE KING'S BENCH, MICHAELMAS TERM, 1669

[*Reported in* 1 *Williams' Saunders,* 319]

DEBT upon a specialty for 774*l.* 15*s.* The plaintiff declares that the defendant by his certain writing of agreement made at, &c., by the plaintiff by the name, &c., and the defendant by the name, &c., and brings the deed into court, &c., it was agreed between the plaintiff and defendant in manner and form following, viz., That the defendant should give to the plaintiff the sum of 775*l.* for all his lands, with house called Ashmole-house thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheelbarrow; and that in pursuance of the said agreement, the defendant had given to the plaintiff 5*s.* as an earnest, and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of 775*l.,* a week after the feast of St. John the Baptist then next following (all other movables, with the corn upon the ground, except). And although the defendant has paid five shillings, parcel, &c., yet the said defendant, although often requested, has not paid the residue, to the damage, &c. The defendant prays oyer of the specialty, which is entered *in hæc verba,* to wit.: "11 May, 1668. It is agreed between Doctor John Pordage and Bassett Cole, esquire, that the said Bassett Cole shall give unto the said doctor 775*l.* for all his lands, with Ashmole-house thereunto belonging, with the brewing vessels as they are now remaining in the said house,

[1] Gower *v.* Capper, Croke El. 543; Bettisworth *v.* Campion, Yelv. 134; Spanish Ambassador *v.* Gifford, 1 Rolle, 336; Thorpe's Case, March, 75; Ware *v.* Chappel, Style, 186; Gibbons *v.* Prewde, Hardres, 102; Beany *v.* Turner, 1 Lev. 193; Cole *v.* Shallett, 3 Lev. 41; Blackwell *v.* Nash, 1 Strange, 535; Martindale *v.* Fisher, 1 Wils. 88, *acc.*

and with the malt-mill and wheelbarrow. In witness whereof we do put our hands and seals: mutually given as earnest in performance of this 5*s.*; the money to be paid before Midsummer, 1668; all other movables, with the corn upon the ground, excepted." And upon oyer thereof the defendant demurs. And *Withins,* of counsel with the defendant, took several exceptions to the declaration. 1. That the demand by the declaration is of 774*l.* 15*s.*; whereas the whole sum is 775*l.*; and the 5*s.* paid for earnest shall not be taken as part of the sum of 775*l.* *Sed non allocatur;* for, *per Curiam,* it shall be intended as part of the sum. 2. That the exception of the residue of the movables is not well recited, for the word (except) in the declaration is not good for want of sense. *Sed non allocatur,* for it is sensible enough in the declaration; and if it were not, the declaration is good; for an insensible clause does not make the rest of the deed vicious which is sensible in itself. 3. The great exception was, that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them; for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them, or tendered a conveyance of them, before he brought his action for the money. And it was argued by *Withins,* that if by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part; Trin. 12 Jac. I. between Holder *v.* Tayloe,[1] Ughtred's case,[2] and Sir Richard Pool's case there cited, and Gray's case,[3] and that the word (*pro*) made a condition in things executory.[4] And here in this case it is a condition precedent which ought to be performed before the action brought; wherefore he prayed judgment for the defendant.

But it was adjudged by the Court that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said that both parties had sealed it; and therefore judgment was given for the plaintiff, which was afterwards affirmed in the Exchequer Chamber, Trin. 22 of King Charles the Second.[5]

[1] 1 Roll. Abr. 518 (C.), pl. 2, 3.
[2] 7 Rep. 10.
[3] 5 Rep. 78, 79; s. c. Cro. Eliz. 405.
[4] Co. Lit. 204 *a.*
[5] In a note to this case, Mr. Serjeant Williams states the following rules for distinguishing between dependent and independent covenants: 1. If a day be appointed

CALLONEL *v.* BRIGGS

At Nisi Prius, coram Holt, C. J., Trinity Term, 1703

[*Reported in* 1 *Salkeld,* 112]

An agreement was, that the defendant should pay so much money six months after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying, &c. *Et per* Holt, C. J. If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender; for transferring in the first bargain was a condition precedent; and though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for performance. 1 Saund. 319. If I sell you my horse for 10*l.*, if you will have the horse I must have the money; or if I will have the money you must have the horse; therefore he obliged the plaintiff either to prove a transfer, or a tender and refusal within the six months.

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for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act. 2. But when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money &c., is to be performed, no action can be maintained for the money, &c., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the, same time, as, where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale.

In Mattock *v.* Kinglake, 10 Ad. & E. 50, Patteson, J., said: "Pordage *v.* Cole is directly in point. We must overrule it if we decided in favor of the defendant," and since a time was fixed for payment and none for conveyance, the court allowed the plaintiff to recover the price without conveying or offering to convey. See also Sibthorp *v.* Brunel, 3 Ex. 826; Dicker *v.* Jackson, 6 C. B. 676; Gibson *v.* Newman, 2 Miss. 341. Compare, however, Wilks *v.* Smith, 10 M. & W. 355; Marsden *v.* Moore, 4 H. & N. 500.

KINGSTON *v.* PRESTON

In the King's Bench, Easter Term, 1773

[*Reported in* 2 *Douglas,* 689.[1]]

This was an action of debt for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated: That, by articles made the 24th of March, 1770, the plaintiff, for the considerations thereinafter mentioned, covenanted with the defendant to serve him for one year and a quarter next ensuing, as a covenant servant, in his trade of a silk-mercer, at 200*l.* a year, and, in consideration of the premises, the defendant covenanted that, at the end of the year and a quarter, he would give up his business of a mercer to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for fourteen years, and from and immediately after the execution of the said deeds the defendant would permit the said young traders to carry on the said business in the defendant's house. Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock-in-trade, at a fair valuation, with the defendant's nephew, or such other person, &c., and execute such deeds of partnership, and, further, that the plaintiff should and would, at and before the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of 250*l.* monthly to the defendant, in lieu of a moriety of the monthly produce of the stock in trade, until the value of the stock should be reduced to 4,000*l.* Then the plaintiff averred that he had performed and been ready to perform his covenants, and assigned for breach on the part of the defendant, that he had refused to surrender and give up his business at the end of the said year and a quarter. The defendant pleaded: 1. That the plaintiff did not offer sufficient security; and, 2, That he did not give sufficient security for the payment of the 250*l.*, &c. And the plaintiff demurred generally to both pleas. On the part of the plaintiff, the case was argued by Mr. *Buller,* who contended that the covenants were mutual and independent, and therefore a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one which he had bound himself to perform, but that the defendant might have his remedy for the breach by the plaintiff in a separate action. On the other side, Mr. *Grose* insisted that the covenants were dependent in their nature, and therefore performance must be alleged. The security to be given for the money

[1] Also reported in Lofft, 194.

was manifestly the chief object of the transaction, and it would be highly unreasonable to construe the agreement so as to oblige the defendant to give up a beneficial business, and valuable stock-in-trade, and trust to the plaintiff's personal security (who might, and indeed was admitted to be worth nothing), for the performance of his part.

In delivering the judgment of the Court, Lord Mansfield expressed himself to the following effect: There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other though it is not certain that either is obliged to do the first act. His lordship then proceeded to say, that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That, in the case before the Court, it would be the greatest injustice if the plaintiff should prevail. The essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent.[1] Judgment was accordingly given for the defendant, because the part to be performed by the plaintiff was clearly a condition precedent.

BOONE *v.* EYRE

In the King's Bench, Easter Term, 1777

[*Reported in* 1 *Henry Blackstone*, 273, *note*]

Covenant on a deed whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of

[1] Roberts *v.* Brett, 11 H. L. C. 337, *acc.*

500*l.* and an annuity of 160*l.* per annum for his life; and covenanted that he had a good title to the plantation, and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that, the plaintiff well and truly performing all and everything therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was the non-payment of the annuity. Plea: that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was a general demurrer.

Lord Mansfield. The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action. *Judgment for the plaintiff.*[1]

THE DUKE OF ST. ALBANS *v.* SHORE

In the Common Pleas, June 29, 1789

[*Reported in* 1 *Henry Blackstone,* 270]

Debt for 500*l.*, the penalty of articles of agreement.

The declaration stated the agreement to have been made between the plaintiff and defendant on the 30th of March, 1878, by which the defendant was to purchase of the plaintiff a certain farm with the appurtenances, together with an acre and half of boggy land, at the price of 2,594*l.*, which was to be paid at Lady-day then next in the following manner: the plaintiff was to accept of a conveyance and surrender of certain copyhold and leasehold premises of the

[1] Ashhurst, J., added, according to a statement by Lord Kenyon in Campbell *v.* Jones, 6 T. R. 570, 573: "There is a difference between executed and executory covenants; here the covenants are executed in part, and the defendant ought not to keep the estate, because the plaintiff has not title to a few negroes."

Boone *v.* Eyre, 2 W. Bl. 1312, was an action between the same parties, brought for later instalments of the annuity. The defendant pleaded breaches of covenant on the part of the plaintiff. *Walker*, for the plaintiff, said, "As to the four last pleas, the matter contained therein is clearly matter of covenant, for which (if founded in fact) the defendant might bring his action; but it is a known rule that covenant cannot be pleaded against covenant." *Glyn*, for the defendant, "would not deny the principle laid down by Walker, but only its application to the present case. This is not a case of mutual covenants, where one is a consideration for the other; but here, the performance of the plaintiff's covenant is made a condition precedent to the performance of those of the defendant. But *per* De Grey, C. J. Where the participle 'doing,' 'performing,' &c., is prefixed to a covenant by another person, it is clearly a mutual covenant, and not a condition precedent: Hunlocke and Blacklowe, 2 Saund. 155."

See also Carpenter *v.* Cresswell, 4 Bing. 409; Rose *v.* Poulton, 2 B. & Ad. 822; Fearon *v.* Aylesford, 14 Q. B. D. 792.

defendant, at the price of 1,820*l.* (to be deducted from the before-mentioned sum of 2,594*l.*), the defendant to convey those premises at the expense of the plaintiff unless a fine should be necessary, the expense of which the defendant was to pay; and the plaintiff to make a good title to the defendant at his (the defendant's) expense, unless a fine or recovery should be necessary, for which the plaintiff was to pay, who, on executing the conveyances, was to receive the rest of the purchase-money. All timber-trees, elms, and willow-trees, which then were upon any of the above estates, to be fairly valued by two appraisers, and the prices or values thereof to be paid by the respective purchasers of the estates at the time before mentioned; the rents of the respective estates to be received by the owners till the 24th of March then next. It was also agreed that, in case the plaintiff should not be enabled to make a good title to the said estate before the said 24th of March, that agreement should be void. And although the plaintiff had done and performed every thing on his part, &c., yet, protesting that the defendant had not done any thing on his part, &c., "in fact, the said duke saith, that he the said duke always from the time of the making of the said articles of agreement, until and upon the said twenty-fourth day of March next ensuing the date thereof, and always since hath been, and is, capable, ready, and willing to make a good title to the said William Shore of the said farm and premises, and boggy land so agreed to be purchased by the said William Shore as aforesaid, and to execute and cause to be executed necessary and proper conveyances and assurances of the said farm and premises, and boggy lands, to the said William Shore, if the said William Shore would have drawn and prepared the same for execution, according to the form and effect of the said articles of agreement, to wit, at Hanworth aforesaid: And the said duke avers that he the said duke, before the twenty-fifth day of March, being Lady-day, 1788, to wit, on the twenty-second day of March, A. D. 1788, at Hanworth aforesaid, gave notice to the said William Shore, that he the said duke was ready and willing at any time to make a good title to the said William Shore of the said farm and premises and land, so agreed to be purchased by the said William Shore, and to execute and cause to be executed proper deeds, conveyances, and assurances for the purpose, if the said William Shore would prepare the same, he the said duke then and there being, and still being, enabled to make, and capable of making, a good title to the said William Shore of the said farm and premises and land, according to the form and effect of the said articles; yet the said William Shore did not, nor would, on or before the said twenty-fourth day of March next ensuing the date of the said articles of agreement, nor hath he at any time hitherto, drawn or prepared, or caused to be drawn or prepared to be executed any deed, conveyance, or assurance whatsoever, of the said farm and premises and lands mentioned in the said articles of agreement, and

so agreed to be purchased by the said William Shore as aforesaid, nor did, nor would pay the said purchase-money or any part thereof, nor did, nor would accept the said title according to the said articles of agreement; but, on the contrary thereof, the said William Shore hath wholly neglected and refused, and still doth neglect and refuse, to draw or prepare any deed, conveyance, or assurance of the said farm, premises, and land, unto the said William Shore, or to pay the said purchase-money or any part thereof, or in any wise to carry the said articles into execution, contrary," &c.

Plea: "That the said duke was not capable, ready, and willing to make, nor could he, the said duke, make a good title to the said William of the said farm so agreed to be purchased, according to the tenor and effect of the said agreement, &c. And for further plea, &c., that after the making of the said agreement, and before Lady-day then next following, to wit, on the twentieth of March, A.D. 1788, the said duke cut down divers, to wit, 500 of the said timber trees, 500 of the said elms, and 500 of the said willow-trees, in the said declaration and agreement respectively mentioned, and by the said agreement agreed to be valued and paid for as in the said agreement is mentioned, whereby the said duke disabled himself from performing, and it became, and was impossible, for him to perform and fulfil the said articles of agreement, on his part, &c.; for which reason he, the said William, declined and refused to carry the said articles into execution on his part, as he lawfully might," &c.

Replication: Issue on the first plea, and general demurrer to the second. Joinder in demurrer.

This was argued in Hilary Term last, by *Lawrence,* Serjt., for the plaintiff, and *Bond,* Serjt., for the defendant, and a second time in Easter Term, by *Le Blanc,* Serjt., for the plaintiff, and *Marshall,* Serjt., for the defendant.

On this day the following judgment of the Court was delivered by LORD LOUGHBOROUGH, who, having stated the pleadings, said:—

It is clear in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant (if I may use the expression), he is not entitled to maintain the action. If he has not set forth a sufficient title, judgment must be against him whatever the plea is, and if the plea be a good bar, the same consequence must follow. It was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and therefore a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of Boone *v.* Eyre was cited; but in that case, though the Court of King's Bench held the plea insufficient, yet they laid down a clear and well founded distinction, that where a covenant went to the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each

party must resort to his separate remedy; and for this plain and obvious reason, because the damages might be unequal. The cases also of Hunlocke *v.* Blacklowe, 2 Saund. 155, and Cole *v.* Shallett, 3 Lev. 41, were cited as being in favor of the plaintiff. But it is unnecessary to enter into the discussion of those cases, though perhaps doubts may reasonably be entertained of the doctrine laid down in Saunders, and though the case cited by him in his argument may deserve full as much consideration as that which was the subject of the determination of the Court. For we found our opinion in the present case on the ground of the distinction in Boone *v.* Eyre, which we think a fair and sound one. Then the question is, Whether the covenant of the plaintiff goes to the whole consideration of that which was to be done by the defendant? Now the duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from the estate by the separate valuation of it. It was expressly agreed that all trees, &c., which then were upon any of the estates should be valued. But it is not to be permitted to a party contracting to convey land, which includes the timber, by his own act to change the nature of it between the time of entering into the contract and that of performing it. There may be cases where the timber growing on an estate is the chief inducement to a purchase of that estate. But it is not necessary to inquire whether it be the chief inducement to a purchase or not; for if it may be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate by cutting down any of it. This is not an action of covenant where one party has performed his part, but is brought for a penalty, on the other party refusing to execute a contract. But to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally to complete his part. We are therefore of opinion that the plea is a good bar to the action, and on this we give our judgment. My brother Marshall made some exceptions to the declaration, which it is not necessary to go into, but which, speaking for myself, I think material. It is to be observed, that this is not a contract absolutely and at all events to convey. Where a man undertakes to convey, he undertakes to convey by a good title. There are cases where a court of equity has holden that a party so undertaking might make a title by procuring an act of Parliament, and that he was bound to purchase in all outstanding terms to make a good title. But in this case, if the plaintiff was not enabled to make a good title before a certain day, the agreement was to be at an end, he might be off and was released from his engagement. He therefore undertook to make a good title before a given time; the breach assigned is, that the defendant refused to accept the title. But what title? What exhibition of title? What title was tendered to him? What was there for him to accept? This, perhaps, is rather *dehors* the question, though it might be material

if it were necessary to take it into consideration.[1] But the ground of our determination is, that the plea is good, as I before stated, within the distinction laid down by the Court of King's Bench in the case of Boone *v.* Eyre. *Judgment for the defendant.*[2]

GOODISSON *v.* NUNN

In the King's Bench, June 19, 1792

[*Reported in* 4 *Term Reports,* 761]

This was an action of debt to recover 21*l.* on certain articles of agreement, the substance of which was stated in the declaration. The defendant craved oyer of the agreement, by which the plaintiff agreed that he would, on or before the 2d of September then next, "by such conveyances, surrenders, assurances, ways, and means in the law, shall reasonably devise, advise, or require,[3] well and sufficiently grant, sell, release, assign, and surrender, or otherwise convey to the defendant all that copyhold tenement, lying," &c. In consideration whereof the defendant covenanted to pay to the plaintiff the sum of 210*l.* on or before the second day of September next ensuing; on failure of complying with the before-mentioned agreement the defendant was to pay to the plaintiff the sum of 21*l.*; and if the plaintiff did not deliver the estate according to the before-mentioned agreement, then he was to pay to the defendant the sum

[1] In Phillips *v.* Fielding, 2 H. Bl. 123, the declaration was held bad because it did not set out the title of the plaintiff. But this case was overruled by Martin *v.* Smith, 6 East, 555. See also Ferry *v.* Williams, 8 Taunt. 62.

[2] Behrman *v.* Newton, 103 Ala. 525, 530; Smyth *v.* Sturges, 108 N. Y. 495, *acc.* See Ames's Cas. Eq. Jur. I. 245, as to the jurisdiction of equity to compel the vendee to take with compensation property slightly varying from the agreement.

In Poole *v.* Hill, 6 M. & W. 835, an action of covenant by the vendor for the failure of the vendee to complete a purchase of real estate, the declaration alleged that the plaintiff was ready and willing to convey, but made no allegation of tender. The defendant demurred. Lord Abinger, C. B., in delivering the judgment of the court, said: "We were at first disposed to think that the averment that the plaintiff was ready and willing to convey was insufficient; but after hearing the point discussed by Mr. Crompton, we are satisfied that it was not necessary to aver more than this. On a contract for the sale of lands, unless it be expressly stipulated otherwise, the conveyance is to be at the expense of and to be prepared by the purchaser. Here it was for the purchaser to make out the conveyance in the usual course; that being done, his agreement is on a given day to pay the purchase-money, and the plaintiff's to execute the conveyance and complete the title. The defendant could not have maintained an action for the non-completion of the purchase, without averring that he had tended a conveyance. He was to perform the initiative before the plaintiff could be called upon to offer a conveyance, and the plaintiff was not bound to execute a conveyance until the defendant had prepared and tended it for execution. The declaration is therefore good, and the judgment will be for the plaintiff."

In the United States, however, the duty of preparing a conveyance devolves upon the vendor. 50 American Decisions, 673; 2 Williston Contracts, § 924; Leaird *v.* Smith, 44 N. Y. 618; Raudabaugh *v.* Hart, 61 Ohio St. 73, 87; Boyd *v.* McCullough, 137 Pa. 7.

[3] The agreement was drawn in this inaccurate manner.

of 21*l.* It was further agreed between the parties that the plaintiff should take up the copyhold as follows, that is to say: "That the plaintiff should take it up either for the defendant or his wife, as they should agree at the time; that the plaintiff should take it up for himself; that each party should pay share and share alike towards the expenses attending the taking it up." The defendant then pleaded, 1st. *Non est factum.* 2d. That the plaintiff did not, on or before the second day of September next, &c., by such conveyances, assurances, surrenders, ways, and means in the law, reasonably devised, advised, and required, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey to the defendant the said premises in the said articles of agreement mentioned, &c. 3d. That the plaintiff did not on or before the second day of September, &c., or at any time since, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey to the defendant the said premises, &c. 4th. That the plaintiff, at the time of the making of the articles, &c., had nothing in the said premises, whereby he could be enabled to grant, &c., to the defendant the said premises, &c.

To the three last pleas the plaintiff demurred generally.

Lord Kenyon, C. J. This case is extremely clear, whether considered on principles of strict law or of common justice. The plaintiff engaged to sell an estate to the defendant, in consideration of which the defendant undertook to pay 210*l.*; and if he did not carry the contract into execution, he was to pay 21*l.* And now, not having conveyed his estate, or offered to do so, or taken any one step towards it, the plaintiff has brought this action for the penalty. Suppose the purchase-money of an estate was 40,000*l.*, it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person. The old cases cited by the plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense. I admit the principle on which they profess to go; but I think that the judges misapplied that principle. It is admitted in them all that where they are dependent covenants no action will lie by one party, unless he have performed or offered to perform his covenant.[1] Then the question is whether these are or are not dependent covenants? I think they are; the one is to depend on the other; when the one party conveyed his estate, he was to receive the purchase-money; and when the other parted with his money, he was to have the estate. They were reciprocal acts to be performed by each other at the same time. It seems, from the case in Strange, that the judges were surprised at the old decisions; and, in order to get rid of the difficulty, they said that a tender and re-

[1] In an action at law, it is universally conceded that if the covenants are dependent the plaintiff cannot recover without proving a tender. As to the rule in equity, see Ames's Cas. Eq. Jur. 342; 2 Williston, Contracts, §§ 834, 844.

fusal would amount to a performance. It is true they went farther, and said that "in consideration of the premises" meant only in consideration of the covenant to transfer, and not in consideration of the actual transferring of the stock; but to the latter part of that judgment I cannot accede. It is our duty, when we see that principles of law have been misapplied in any case, to overrule it. The principle is admitted in all the cases alluded to that, if they be dependent covenants, performance or the offer to perform must be pleaded on the one part, in order to found the action against the other. The mistake has been in the misapplication of that principle in the cases cited. And I am glad to find that the old cases have been overruled, and that we are now warranted by precedent as well as by principle to say that this action cannot be maintained.

Judgment for the defendant.[1]

MORTON *v.* LAMB

In the King's Bench, February 1, 1797

[*Reported in* 7 *Term Reports,* 125]

In an action on the case, the plaintiff declared against the defendant, for that whereas, on the 10th February, 1796, at Manchester, in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant, had then and there bought of the defendant 200 quarters of wheat, at 5*l.* 0*s.* 6*d.* per quarter, such price to be therefor paid by the plaintiff to the defendant, he the defendant undertook and then and there promised the plaintiff to deliver the said corn to him the plaintiff at Shardlow, in the county of Derby, in one month from that time, viz., of the sale; and then he alleged that, although he the plaintiff always, from the time of making such sale for the space of one month then next following and afterwards, was ready and willing to receive the said corn at Shardlow, yet the defendant, not regarding his said promise, &c., did not in one month from the time of the making of such sale as aforesaid, or at any other time, deliver the said corn to the plaintiff, at Shardlow or elsewhere, although he the defendant was often requested so to do, &c. The defendant pleaded the general issue; and at the trial the plaintiff recovered a verdict.

Holroyd obtained, in the last term, a rule calling on the plaintiff to shew cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery. He said this was necessary on the principle established in many cases,

[1] Buller & Grose, JJ. delivered concurring opinions. Pead *v.* Trull, 173 Mass. 450; Ackley *v.* Elwell, 5 Halst, 304, *acc.*

particularly in Thorpe *v.* Thorpe, Callonel *v.* Briggs, Kingston *v.* Preston, Jones *v.* Barclay, and Goodisson *v.* Nunn, that when something is to be done by both parties to a contract at the same time, as in this case the tendering of the money and the delivery of the corn, there the party suing the other for non-performance of his part must aver an offer at least at the same time to perform what was to be done by himself.

Law, Wood and *Scarlett* now showed cause.

Lord Kenyon, C. J. If this question depended on the technical niceties of pleading, I should not feel so much confidence as I do; but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time; and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff; to this declaration the defendant objects, and says, "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is, whether that should or should not have been alleged. The case decided by Lord Holt, in Salk. 112. if, indeed, so plain a case wanted that authority to support it, shows that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of justice, must show that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it; but they do not appear to me to be applicable. In the one in Saunders,[1] the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in Salk. 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned; but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of Campbell *v.* Jones, I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done; but here both things — the delivery of the corn by one, and the payment by the other — were

[1] 2 Saund. 250.

to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

Rule absolute.[1]

WITHERS *v.* REYNOLDS

In the King's Bench, November 14, 1831

[*Reported in* 2 *Barnewall & Adolphus,* 882]

Assumpsit for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, C. J., at the Sittings in Middlesex after last Hilary Term, the agreement proved was as follows: —

John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stablekeeper, and delivered on his premises as above (*i.e.*, at Long Acre, London), till the 24th of June, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830, according to the terms of this agreement.

(Signed) Joseph Withers, John Reynolds.

The straw was regularly sent in from the 20th of October, 1829, when this agreement was made, till the end of January, 1830. At that time, the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant 11*l.* 11*s.*, being the price of all the straw delivered, except the last load, saying that he should always keep one load in hand. The defendant objected to this, but was at length obliged to take the sum offered; and he then told the plaintiff that he would send no more straw unless it was paid for on delivery; and accordingly no more was sent. On the part of the defendant it was submitted that there must be a nonsuit, inasmuch as the plaintiff, on his own showing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden, C. J., was of this opinion, but directed a verdict for the plaintiff, reserving the point. A rule *nisi* was afterwards obtained for entering a nonsuit.

Campbell and *R. V. Richards* now showed cause. Two things independent of each other were stipulated by this contract to be done by the respective parties; the defendant was to deliver straw; the plaintiff to pay the price. No time of payment was specified. There appears nothing which could entitle the defendant to insist on receiving his money till the whole quantity of straw was delivered. Payment, then, was not a condition of the defendant's performance

[1] Brennan *v.* Ford, 46 Cal. 7, 16; Louisville Packing Co. *v.* Crain, 141 Ky. 379; Skillman Hardware Co. *v.* Davis, 53 N. J. L. 114; Dunham *v.* Pettee, 8 N. Y. 508, *acc.* See also Rawson *v.* Johnson, 1 East, 203; Uniform Sales Act, Sec. 42.

of his contract. His promise was given in consideration that the plaintiff promised to pay, not in consideration of performance. If the plaintiff was bound to pay for each load on delivery, still it does not follow that a refusal to pay for one load excused the defendant from any future performance of his contract. Weaver *v.* Sessions.[1] And, according to that case, he ought at least to have shown that he subsequently made a tender of executing his part of the agreement, which the plaintiff rejected. The defendant, therefore, upon his construction of the agreement, may be entitled to bring a cross-action, but has no defence to this.

Platt, contra. The only question is upon the construction of this agreement. It is true, no time of payment was specified, but, in the absence of any express stipulation, the money would be payable on demand as often as it became due; and here the words, "to pay thirty-three shillings per load for each load so delivered," intimate that the price of each load was to be due as soon as it was delivered. (Here he was stopped by the Court.)

Lord Tenterden, C. J. I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether, upon the plaintiff's saying "I will not pay for the goods on delivery" (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw: and he clearly was not obliged to do so.

Parke, J. The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery (as he did in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him.

Taunton, J. The contract does not say merely that so much straw shall be supplied at thirty-three shillings a load, but it adds that the plaintiff shall pay that sum "for each load of straw delivered on his premises" from the date of the agreement till the 24th of June, 1830. That *prima facie* imports that each load was to be paid for as delivered.

Patterson, J. If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract.

Rule absolute.

[1] 6 Taunt. 154.

OLIVER KANE ET AL. *v.* JOHN HOOD

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 27, 1832

[*Reported in* 13 *Pickering,* 281]

ASSUMPSIT, brought by the executors of John Innis Clark. Trial before SHAW, C. J.

The plaintiffs rely upon an unsealed contract made by Clark and Hood, dated October 28, 1803, by which "it is mutually agreed that Hood is to have the land, &c. (describing certain land in Somerset) in consideration of which the said Hood is to pay the said Clark $700, $200 of which are to be paid in ten days, half the remainder in twelve months, and the other half in two years, from the above date, with the interest annually; and the deed to be executed at the completing of the last payment."

The two first instalments had been paid and received before the commencement of this action.

The plaintiffs neither allege nor prove that they ever made or tendered or offered any deed or conveyance of the land, but they aver that Clark, in his lifetime, and they, in their capacity of executors, since his decease, have always been ready to convey the land to Hood, and to execute to him a good and sufficient deed thereof, upon his complying with the terms of the contract on his part, and that they are here in court ready to execute such deed upon his complying with those terms.

The defendant contends that, the two first instalments being fully paid, the agreements of the parties, in respect to the last instalment, are mutually dependent and conditional, and neither is bound to perform without a tender of performance on the other side, to be made at the same time.

On the contrary, the plaintiffs contend that the promise of the defendant is independent, and that he was bound to pay at the time and conformably to the terms of the contract, in consideration of the engagement of Clark, without any tender of performance on the part of the plaintiffs.

The plaintiffs became nonsuit, subject to the opinion of the Court on the above question.

Cobb, for the plaintiffs, cited Terry *v.* Duntz, 2 H. Bl. 389; 1 Wms. Saund. 320, note 4; Gardiner *v.* Corson, 15 Mass. 500.

W. Baylies and *Battelle,* for the defendant, cited Callonel *v.* Briggs, 1 Salk. 112; Thorpe *v.* Thorpe, ibid. 171; Jones *v.* Barkley, 2 Doug. 684; Goodisson *v.* Nunn, 4 T. R. 761; Glazebrook *v.* Woodrow, 8 T. R. 366; Phillips *v.* Fielding, 2 H. Bl. 123; Martin *v.* Smith, 6 East, 555; Johnson *v.* Reed, 9 Mass. 78; Cunningham *v.* Morrell, 10 Johns. 203; Couch *v.* Ingersoll, 2 Pick. 292; Dana *v.* King, ibid. 155; Hunt *v.* Livermore, 5 Pick. 395; Bean *v.* Atwater, 4 Conn. 3; Parker *v.* Parmele, 20 Johns. 130.

SHAW, C. J., delivered the opinion of the Court. This is a contract not under seal, but the same rules govern the construction of it as those applicable to cases of covenant. The only question which would seem to be presented by the fact is, whether, in a contract between parties relative to the same subject-matter, some stipulations may be mutual and independent, and others dependent and mutually conditional; and this question was settled in the case of Couch *v.* Ingersoll, 2 Pick. 292. Indeed, the point in question constituted distinctly the ground of decision in that case, because the plaintiff, without having tendered performance on his part, recovered on a breach of one covenant because it was independent, and failed on the other, because, upon the construction put upon it by the Court, it was independent.

In the present case, the two first instalments of the purchase-money were to be paid before the time fixed for the conveyance of the land, and therefore it is very clear they are independent. Had a suit been brought for either of them, no tender, offer, or averment of readiness, would have been necessary, and no defence could have been made. The obligation of the defendant to pay the money at the times stipulated was absolute and unconditional. But it is shown by the facts, that the two first instalments were fully paid; and though payment was not made at the times fixed, yet it was afterwards accepted, and the plaintiffs affirmed the contract by suing on it. Then the question is, whether the payment of the last instalment on the one side, and the execution and tender of the deed, upon payment being made, on the other, were not dependent and conditional; and we think they were. The words are, "and the other half in two years, with interest annually, and the deed to be executed at the completing of the last payment." Suppose the whole had been payable at once, instead of being payable by instalments, and the stipulation had been to pay seven hundred dollars in two years, the deed to be executed at the payment; upon this statement of the question, is there a doubt that the agreements would have been mutually dependent and conditional? I think not. The intent of the parties is to govern. And what difference is there, whether the final payment is the whole or part, the remainder of the purchase-money having been and accepted? Where the whole purchase-money is to be paid at once and the deed is to be then given, the covenant—are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration, without having the equivalent in a title to the land purchased. The same reason applies to the last instalment. An obvious reason why the first and second instalments should be paid without having a deed is, that the vendor was to withhold the title as a security for the purchase-money, and the vendee was content to rely on the vendor's contract for his future title; but no such reason applies to the final and complete payment of the purchase-money. Whether, therefore, we consider the par-

ticular language of the contract, or the general intent of the parties, we think these parts of the contract were mutually dependent and conditional, and the plaintiffs cannot recover without averring performance or an offer to perform on their part. *Plaintiff's nonsuit.*[1]

ELLEN *v.* TOPP

In the Exchequer, April 15, 1851

[*Reported in* 6 *Exchequer Reports,* 424]

Covenant on an indenture of apprenticeship of the 21st of July, 1846, by the master against the father of the apprentice, the father being a party to the indenture. The material parts of this indenture (of which profert was made) were as follows: "This indenture witnesseth, that Richard Topp, an infant, of the age of sixteen years or thereabouts, by and with the consent of his father, George Topp, of, &c., farmer, doth put himself apprentice to Frederick Ellen, of, &c., auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve from the 1st day of July now last past unto the full end and term of five years from thence next following, to be fully complete and ended; during which term the said apprentice his master faithfully shall serve, his secrets keep, his lawful commands everywhere gladly do." The indenture then proceeded to state that the apprentice should do no damage to his master, &c., and that he "shall not absent himself from his master's service day or night unlawfully, but in all things, as a faithful apprentice, he shall behave himself towards his said master and all his during the said term. And the said Frederick Ellen, in consideration of the sum of 70*l.* to him in hand paid by the said George Topp upon the execution of these presents (the receipt whereof the said Frederick Ellen doth hereby acknowledge), doth hereby covenant and agree to and with the said George Topp, his executors and administrators, and also the said Richard Topp, that he, the said Frederick Ellen, his executors and administrators, his said

[1] Bank of Columbia *v.* Hagner, 1 Pet. 455; Hill *v.* Grigsby, 35 Cal. 656; Sanford *v.* Cloud, 17 Fla. 532; Duncan *v.* Charles, 5 Ill. 561; Runkle *v.* Johnson, 30 Il. 332; Headley *v.* Shaw, 39 Ill. 354; McCulloch *v.* Dawson, 1 Ind. 413; Summers *v.* Sleeth, 45 Ind. 598; Clark *v.* Continental Improvement Co., 57 Ind. 135; Berryhill *v.* Byington, 10 Iowa, 223; Courtright *v.* Deeds, 38 Iowa, 507; Wadlington *v.* Hill, 18 Miss. 560; Eckford *v.* Halbert, 30 Miss. 273; Robinson *v.* Harbour, 42 Miss. 795; Ackley *v.* Elwell, 5 Halsted, 304; Egbert *v.* Chew, 2 Green, (N. J. L.) 446; Shinn *v.* Roberts, 1 Spencer, 435; Johnson *v.* Wygant, 11 Wend. 48; Glenn *v.* Rossler, 156 N. Y. 161; Powell *v.* Dayton, &c. R. R Co., 14 Oreg. 356, *acc.* See also Giles *v.* Giles, 9 Q. B. 164.

Weaver *v.* Childress, 3 Stew. (Ala.) 361; Hays *v.* Hall, 4 Port. 374, 387; White *v.* Beard, 5 Port. 94, 100; Miller *v.* Wild Cat Road Co., 52 Ind. 51; Clopton *v.* Bolton, 23 Miss. 78; McMath *v.* Johnson, 41 Miss. 439; Morris *v.* Sliter, 1 Denio, 59; Gale *v.* Best, 20 Wis. 44; Shenners *v.* Pritchard, 104 Wis. 287, *contra.* See also Loud *v.* Pomona Land Co., 153 U. S. 564; Gibson *v.* Newman, 2 Miss. 341.

apprentice in the art of an auctioneer, appraiser, and corn-factor, which he useth, by the best means that he can, shall teach, and instruct, or cause to be taught and instructed, finding unto the said apprentice sufficient meat, drink, and lodging, and other necessaries during the said term, except wearing apparel, medical attendance, and pocket-money; and the said George Topp, for himself, his executors and administrators, doth hereby covenant and agree with the said Frederick Ellen, his executors and administrators, that he the said George Topp, his executors and administrators, shall and will find and provide his said son Richard Topp with wearing apparel, medical attendance, washing, and pocket-money, during the said term; and for the true performance of all and every the said covenants and agreements, either of the said parties bindeth himself unto the other by these presents." The declaration then stated, that the said Richard Topp afterwards, to wit, on the said 21st of July, 1846, entered and was then received into the service of the plaintiff as such apprentice as aforesaid, and continued in such service under and by virtue of the said indenture for a long space of time, to wit, from the day and year last aforesaid until and upon the 22d of July, 1849; and laid as a breach that the said Richard Topp did not nor would faithfully serve the plaintiff according to the tenor and effect, true intent and meaning of the said indenture, but on the contrary thereof the said Richard Topp, during the said term of five years in the said indenture mentioned, to wit, on the said 22d of July, 1849, did unlawfully absent himself from the service of the plaintiff, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture, and of the said covenant of the defendant in that behalf made as aforesaid, to the plaintiff's damage, &c.

The defendant, after setting out the indenture on oyer, pleaded that the plaintiff, at the time of the making of the said indenture as in the declaration mentioned, exercised the art and carried on the business of an auctioneer, appraiser, and corn-factor, as therein mentioned; and that the apprenticeship and covenants aforesaid were made with the plaintiff as such auctioneer, appraiser, and corn-factor, and not otherwise, and that, after the making of the said indenture, and before the accruing of the cause of action, &c., to wit, on, &c., the plaintiff voluntarily and of his own free will gave up, relinquished, abandoned, and ceased to exercise and carry on, and hath not, at any time since, exercised and carried on the art and business of a corn-factor as aforesaid. Verification.

Replication: That the plaintiff relinquished his business as a corn-factor aforesaid, with the full knowledge and consent of the defendant in that behalf; and that, from the time of such relinquishment continually until the accruing of the cause of action in the declaration mentioned, the said Richard Topp, with full knowledge of such relinquishment as aforesaid, continued, with the consent of

the defendant in that behalf, to serve the plaintiff under the said indenture. Verification.

Special demurrer to the replication, *inter alia,* on the grounds that the consent of the defendant to the relinquishment by the plaintiff of his business of a corn-factor aforesaid, and to the continuing of the said Richard Topp to serve the plaintiff as in the replication mentioned, is not alleged to have been given or contained by or in any deed or instrument under the seal of him the defendant, and that the contract in the declaration mentioned could not in law be varied or altered by parol, or by any consent other than a consent given or contained in some deed or instrument under seal; and that the replication is a departure from the declaration; that the contract relied upon in the declaration is a contract to employ and serve in the art and mystery of an auctioneer, appraiser, and corn-factor; and the replication sets up some new alleged contract to employ and serve in the art and mystery of an actioneer and appraiser only.

Joinder in demurrer.

The demurrer was argued in Easter Term last (April 26, 1850), before POLLOCK, C. B., PARKE, B., ROLFE, B., and PLATT, B., by *Macnamara* for the defendant, in support of the demurrer, and by *Taprell* for the plaintiff; and the Court took time to consider their judgment; but afterwards POLLOCK, C. B., said that, as a difference of opinion existed among certain members of the Court, they wished to hear the case re-argued. The case was accordingly re-argued in Hilary Term last (Jan. 20), before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B., by

Macnamara for the defendant in support of the demurrer.

Taprell, contra.

The judgment of the Court was now delivered by

POLLOCK, C. B. This was an action on an indenture of apprenticeship by the master against the father of the apprentice, the father having been party to the indenture. The breach assigned is, that the apprentice did not nor would faithfully serve the plaintiff according to the tenor and effect of the indenture; but on the contrary did on the 22d of July, 1849, unlawfully absent himself from the service of the plaintiff, and has henceforth continued absent from such service. [The Lord Chief Baron, after stating the pleadings, proceeded:] On the part of the plaintiff it was scarcely contended that the replication could be supported. It is obviously bad. Such parol consent cannot entitle the plaintiff to maintain an action of covenant in this form, which is founded entirely on the deed under seal.[1] The case therefore resolves itself into the only question really argued before us, which was whether the plea was good. . . . The objection taken by Mr. Taprell was, that the carrying on all the three trades was not a condition precedent to the plaintiff's right to

[1] But see Thomason *v.* Dill, 30 Ala. 444, 456; Palmer *v.* Meriden Britannia Co., 188 Ill. 508; Blagborne *v.* Hunger, 101 Mich. 375; Stees *v.* Leonard, 20 Minn. 494.

recover, but that his omission or refusal to carry on any one must be the subject of a cross-action.

This objection is founded on one of the rules for determining when covenants are dependant on each other which is laid down in Boone *v.* Eyre, and followed in Campbell *v.* Jones and other cases collected in the note to 1 Wms. Saund. 320c. That rule is, that when a covenant goes to part of the consideration on both sides, that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant, the covenant is independent, and the performance of it is not a condition precedent.

"The reason of the decision in these cases is," as is observed by the learned editor, "that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not had the whole, he should, therefore, be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto;* and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less: as in the cases referred to, the defendant, in the first, might have objected to the transfer, if the plaintiff had no good title to the negroes, and refused to pay; in the second, he might have objected to the payment if the plaintiff had refused to transfer the patent, though he had been willing to teach the art of bleaching. But this is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if, in the case of Boone *v.* Eyre, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it.

Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us; but, after much consideration, we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we

are disposed to think, have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable *in futuro,* yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice; and, if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another.

As the plaintiff by his own fault has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant's son refusing to continue to serve in any.

Our judgment will, therefore, be for the defendant.

Judgment for the defendant.[1]

GRAVES *v.* LEGG and Another

In the Exchequer, May 9, 1854

[*Reported in* 9 *Exchequer Reports,* 709]

The declaration stated, that it was on the 19th of May, 1853, through Messrs. H. & R., brokers at Liverpool, agreed between the plaintiff and defendants in manner following, that is to say, the plaintiff then agreed to sell to the defendants, and the defendants to buy of the plaintiff, about 300 to 350 bales white washed Donskoy fleece wool, to arrive, at 10½*d.* per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, old style, to be shipped with all despatch, warranted fair average quality, but, should they prove otherwise, to be taken with a fair allowance, which it was mutually agreed between buyer and seller

[1] Compare the following apprenticeship cases. Winstone *v.* Linn, 1 B. & C. 460; Wise *v.* Wilson, 1 C. & K. 662; Phillips *v.* Clift, 4 H. & N. 168; Raymond *v.* Minton, L. R. 1 Ex. 244; Learoyd *v.* Brook, [1891] 1 Q. B. 431; United States *v.* Scholfield, 1 Cranch C. C. 255; Gusty *v.* Diggs, 2 Cranch C. C. 210; Warner *v.* Smith, 8 Conn. 14; M'Grath *v.* Herndon, 4 T. B. Mon. 480; Powers *v.* Ware, 2 Pick. 451; Commonwealth *v.* Linker, 8 Phila. 455; Commnwealth *v.* Edwards, 6 Binney, 203; Commonwealth *v.* Deacon, 6 S. & R. 526. Promises in other partly bilateral contracts were held dependent in Allen *v.* Saunders, 7 B. Mon. 593; Jones *v.* Marsh, 22 Vt. 144.

should be assessed by the said Messrs. H. & R.; subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped; customary allowances, payment, cash in fourteen days, less 1½ per cent discount, from the date of finishing loading. Which agreement being made, afterwards the said wool, being 333 bales of wool of the quality and description in the said agreement mentioned, was, during the said month of August, old style, delivered, to wit, by the growers thereof at Odessa, to wit, to the agents of the plaintiff in that behalf, and was with all despatch then shipped there on board a certain vessel called the Science, which said vessel then sailed from Odessa with the said wool on board thereof, and afterwards, to wit, on the 22d of November, 1853, arrived at Liverpool with the said wool on board safe and in good condition, and according to the terms of the said contract; and the plaintiff says, that the defendants have had notice of all the said premises, and that a reasonable time for the defendants to accept the said wools after the same arrived, and to fulfil their part of the contract, and pay for the said wools, has long since elapsed, and that he the plaintiff has at all times performed and fulfilled, and been ready and willing to perform and fulfill, all conditions precedent to his right to have the said wools accepted and paid for, and to his right to maintain this action. Yet the defendant would not at any time accept nor pay for the said wools, or any part thereof.

Plea: that the defendants agreed with the plaintiff to buy the said wool in the declaration mentioned, for the purpose of reselling the same in the way of their, the defendants', trade and business of wool-dealers, and thereby acquiring gains and profits. And further, that wool is an article that fluctuates greatly in price in the market; and that the defendants could only resell the said wool as aforesaid when, and not before, the defendants had notice of the same being shipped, and when and not before the name of the vessel in which it was so shipped had been declared, according to the said contract in the declaration mentioned; of all which premises the plaintiff, at the time of the making of the said agreement, had notice; and further that, although the plaintiff had such notice, yet the plaintiff did not declare to the defendants, or either of them, the name of the vessel in which the said wool was shipped, or within the time at or within which he was by the agreement bound to declare the same, that is to say, as soon as such wool was so shipped, but omitted so to do and delayed and omitted so to declare the name of the said vessel in which the said wool was so shipped as in the said declaration mentioned, or to give the defendants any notice of the same being so shipped, for a long and unreasonable time after the same was so shipped; and the defendants had not notice of the shipment of the said wool, or of the name of the vessel in which the same had been shipped, until after the expiration of a long and unreasonable

time after the same had been so shipped, and after the plaintiff was bound and ought to have given and declared the same, and might and could have done so; and further, that between the time when the name of the said vessel ought to have been declared according to the said agreement in the said declaration mentioned, and the time when it was first declared to the defendants, or when they first had any notice of the said ship having sailed with the said wool on board thereof, the price of wool in the market had greatly fallen, and the said wool thence continually remained so fallen in price, and the same, when the name of the said vessel was first declared, and when the defendants first had notice or knowledge of the same having been so shipped, would sell or could be sold only for a much less sum of money than it would have done at the time when the plaintiff ought to and could have declared the name of the said vessel, or given the defendants such notice as aforesaid. Wherefore the defendants did not nor would accept or pay for the said wool, as in the said declaration mentioned.

Demurrer and joinder.

The case was argued in the present Term (May 3), by

Blackburn, in support of the demurrer.

C. E. Pollock, contra.

The judgment of the Court was now delivered by

Parke, B. The pleadings in this case are these (his lordship stated them, and proceeded): The question raised by these pleadings is whether the provision, that the names of the vessels should be declared as soon as the wools were shipped, was a condition precedent to the defendants' obligation to accept and pay for the wools according to the contract stated in the declaration, and under the circumstances stated in the plea.

This contract, we think, is to be construed with reference to some of those circumstances. It is stated in the plea, that the wool was bought, with the knowledge of both parties, for the purpose of reselling it in the course of the defendants' business; that it is an article of fluctuating value, and not salable until the names of the vessels in which it was shipped should have been declared according to the contract.

The declaration having averred, according to the 57th section of the Common Law Procedure Act, the performance of conditions precedent generally, the defendant proceeds in this plea to specify this condition of declaring the names of the vessels, as one on the breach of which he insists. The loss which he avers to have sustained by that breach is immaterial. The only question is, whether the performance of the agreement was a condition precedent or not to the defendants' contract to accept and pay for the goods.

In the numerous cases on the subject, in which it has been laid down that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning

of the parties to be collected from the instrument, and of course to the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration, under the old system of pleading; and under the new, the denial of such performance would be bad; and the cases of Campbell *v.* Jones and Boone *v.* Eyre[1] are instances of the application of the rule. But then it appears, as Mr. Serjt. Williams observes in 1 Saund. 320 d (and the Lord Chief Baron, in delivering the judgment of this Court in Ellen *v.* Topp, adopts the observation), the reason of the decision in that and similar cases, besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreemnt, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. Mr. Serjt. Williams goes on to observe that it must appear upon the record that the consideration was extended in part. This may appear by the instrument declared on itself, whereby a valuable right, part of the consideration, is conveyed, as in Campbell *v.* Jones or Boone *v.* Eyre, or by averment in pleading. When that appears, it is no longer competent for the defendant to insist upon the nonperformance of that which was originally a condition precedent;[2] and this is more correctly expressed, than to say it was not a condition precedent at all.

In this case, if the stipulation that the names of the vessels should be stated as soon as the wools were shipped was originally a condition precedent, it is so still. No other benefit was taken under the contract itself, as the consideration for the promise to pay the money, than the shipment and delivery of the goods by the named vessels; nor was any subsequently received by the acceptance of the goods or any part thereof. After such acceptance, the defendants would have been bound to pay the price, or the residue of it, and could not have insisted on the neglect to name in due time, but, if there had been any such neglect, would nevertheless have had their remedy for the damage by cross-action on the contract to declare the names. In the state of things on this record, the simple question is, whether this contract was originally a condition precedent or

[1] 2 Black. Rep. 1312, 1315.

[2] See White *v.* Beeton, 7 H. & N. 42; Kauffman *v.* Raeder, 108 Fed. Rep. (C. C. A.) 171; Keller *v.* Reynolds, 12 Ind. App. 383; Swobe *v.* New Omaha Electric Light, 39 Neb. 586.

not. Looking at the nature of the contract, and the great importance of it to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition precedent, quite as much indeed as the shipping of the goods at Odessa, with all despatch, after the end of August. And with respect to the shipment itself, Mr. Blackburn did not venture to contend that the performance of the plaintiff's contract in that respect was not a condition precedent.

The defendants, therefore, have a right to object to fulfil the contract on their part, as the plaintiff did not fulfil his, though they could no longer object to the plaintiff's non-performance had they afterwards taken any benefit under the contract.

Judgment for the defendants.[1]

OLLIVE *v.* BOOKER

In the Exchequer, November 13, 1847

[*Reported in* 1 *Exchequer Reports,* 416]

Assumpsit to recover damages for breach of a contract of charter-party, which was in the following terms: "London, 24th December, 1844. Charter-party. It is this day mutually agreed between Messrs. Ollive, Nephew, & Co., original charterers of the good ship or vessel called the Dove, A 1, of the measurement of 149 tons or thereabouts, now at sea, having sailed three weeks ago, and Messrs. Booker & Co., merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Marseilles (after having delivered her cargo at Genoa for ship's account), or so near thereunto as she may safely get, and there load from the factors of the said charterers a full cargo of linseed or other goods, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to one safe port in the United

[1] "The right of a party to enforce a contract will not be forfeited or lost by reason of technical, inadvertent, or unimportant omissions or defects. A substantial performance must be established, in order to entitle the party claiming the benefit of the contract to recover; but this does not mean a literal compliance as to details that are unimportant. There must be no wilful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intended to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact." Miller *v.* Benjamin, 142 N. Y. 613, 617. Applications of this principle to cases where a partial breach was held fatal may be found in Glazebrook *v.* Woodrow, 8 T. R. 366; H. D. Williams Cooperage Co. *v.* Schofield, 115 Fed. Rep. (C. C. A.) 119; Worthington *v.* Gwin, 119 Ala. 44; Leopold *v.* Salkey, 89 Ill. 412; Lake Shore, &c. Ry. Co. *v.* Richards, 152 Ill. 59; Ballance *v.* Vanuxem, 191 Ill. 319; Davis *v.* Jeffris, 5 S. Dak. 352; McLean *v.* Brown, 15 Ont. 313, 16 Ont. App. 106.

Kingdom, calling at Cork or Falmouth for orders, which are to be given in due course of post, or so near thereunto as she may get, and deliver the same on being paid freight at and after the rate of 5*s.* 6*d.* per imperial quarter for linseed, or other goods in full proportion, according to the London printed rates delivered, the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted. The freight to be paid on unloading and right delivery of the cargo, one-third in cash, and the remainder by an approved bill on London at three months' date. Thirty working days are to be allowed, Sundays excepted, the said merchant (if the ship is not sooner despatched) for loading the said ship at Marseilles, and unloading at the return port; mats and bulkheads to be found by the charterers, and dunnage by the ship, and —— days on demurrage, over and above the said laying days, at 4*l.* per day; the penalty for the non-performance of this agreement, 400*l.*; the vessel to be consigned to the freighters' agents at Marseilles; cash for usual disbursements at Marseilles, free of interest and commission but the insurance. Bills of lading to be signed for more or less freight, without prejudice to the charter-party. Per proc. Booker & Co., Thomas Booker, jun.; Ed. Ollive, Nephew, & Co.; John Aitkin, witness to the signature of Messrs. Booker & Co., and of Messrs. Ed. Ollive & Co. The commission on this charter-party is at 5*l.* per cent, due ship lost or not lost. The vessel to be addressed to Alexander Howden or his agents at the port of discharge."

The first count of the declaration, after setting forth the provisions of the charter-party, averred mutual promises, and performance on the part of the plaintiff, and assigned as a breach that "the defendant did not nor would, within the space of the said thirty working days in the said last-mentioned charter-party, ship a full cargo of linseed or other goods, according to the terms of the said last-mentioned charter-party, in or on board the said ship or vessel, according to the tenor and effect of the said last-mentioned charter-party and of his said promise aforesaid, but on the contrary the defendant both neglected," &c.

The eighth plea to the first count, after setting out the charter-party verbatim, proceeded as follows: And the defendant avers that upon the making of the said charter-party, time was an essential and material part of the contract, and that the probable situation of the vessel, with reference to the date of her sailing, was also a material and essential part of the contract, to wit, with reference to the object of the said voyage and the distance of the said port of Marseilles, and the nature of the said intended cargo and the time of year at which the said charter-party was made. And the defendant further says, that in point of fact at the time of the making of the said charter-party the said vessel had not sailed three weeks before,

but on the contrary had sailed at a materially and unreasonably later time, to wit, one week later, which the plaintiff at the time of the making of the said charter-party knew, and whereof the defendant had no notice or knowledge; wherefore the defendant wholly declined to accept or employ the said vessel under the said charter-party, to wit, immediately upon learning and knowing that the said vessel had not sailed as in the said charter-party set forth, to wit, upon the 1st of February, 1845, and wholly neglected and refused to load any cargo on board her, to wit, upon the day and year last aforesaid, as he lawfully might for the cause aforesaid. Verification. Replication, *de injuria.*[1]

At the trial, at the Sittings after last Hilary Term, before the Lord Chief Baron, a verdict was found for the plaintiff upon all the issues, except those raised by the eighth, ninth, and eleventh pleas, and upon these issues the defendant had a verdict; leave being reserved to the plaintiff to move to enter a verdict upon them also.

Crowder having obtained a rule *nisi* accordingly, and also for judgment *non obstante veredicto* upon the eighth plea.

Watson and *Greenwood* now showed cause.

PARKE, B. I am of opinion that the rule for judgment *non obstante veredicto* on the eighth plea ought to be discharged. It seems to me that the averment in the plea, that at the time of entering into the charter-party the plaintiff knew that the vessel had sailed a materially and unreasonably later time than that which was stipulated for, is an immaterial averment, and might be struck out. The main question, however, in the construction of this plea, is, whether the allegation in the charter-party, of the vessel being "now at sea, having sailed three weeks ago," is a warranty or a representation. In the construction of agreements, as in the case of contracts under seal, we should endeavor to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks; and, if time is of the essence of the contract, no doubt it is a warranty and not a representation. Such also is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the vessel had sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel. This being a condition precedent, and not performed, the defendant was not bound to load the vessel. If he had loaded her, the breach of the condition would have been waived, and he would have been liable for the full freight. I entirely agree with the reasoning of Tindal, C. J., in the case of Glaholm *v.* Hays, which I think applies to the present case. There the stipulation was held to be a condition precedent. The defendant was entitled to say that he was not bound to load the vessel, as the condition had not been performed, and that

[1] The statement of the pleadings has been materially abbreviated.

the case was the same as if the vessel had not proved to be A 1, as she was warranted to be. I think, therefore, that the plea affords a good answer, and that the rule for judgment *non obstante veredicto* ought to be discharged.

ALDERSON, B. I am of the same opinion. The words which describe the ship as being A 1 amount to a warranty, and the statement that she had sailed for three weeks is equally so. The question, whether these words amount to a condition precedent has been decided by Glaholm *v.* Hays; the reasonings there are applicable to the present case, and I am unable to distinguish the two cases.

ROLFE, B. I am of the same opinion. The stipulation in the present case is not collateral matter, but is a part of the contract. I agree with the rest of the Court, that the case in the Common Pleas governs this. There the stipulation was that the vessel should sail, but that makes no difference. The condition was founded upon the object that she should load her cargo in a certain time; and if it had been that she should load in six weeks, that being the length of the voyage, that would be the same as a condition that she should load in the ordinary time, of which she had already been three weeks at sea. I think the case is governed by that in the Common Pleas, which is consistent with common sense and reason. The rule, therefore, for judgment *non obstante veredicto* must be discharged.

Rule discharged.[1]

THOMPSON AND OTHERS *v.* GILLESPY

IN THE QUEEN'S BENCH, June 1, 1855

[*Reported in* 5 *Ellis & Blackburn,* 209]

THE first count of the declaration alleged that a charter-party was made and entered into by and between plaintiffs and defendant, of which the following is a copy: "LONDON, 14th October, 1854. — It

[1] See also Glaholm *v.* Hayes, 2 M. & G. 257; Behn *v.* Burness, 3 B. & S. 751; Corkling *v.* Massey, L. R. 8 C. P. 395; Oppenheim *v.* Fraser, 34 L. T. 524; Bentsen *v.* Taylor, [1893] 2 Q. B. 274; Lowber *v.* Bangs, 2 Wall. 728; Davison *v.* Von Lingen, 113 U. S. 40; Deshon *v.* Fosdick, 1 Woods, 286; The Orsino, 24 Fed. Rep. 918; The March, 25 Fed. Rep. 106; Pedersen *v.* Pagenstecher, 32 Fed. Rep. 841; Gray *v.* Moore, 37 Fed. Rep. 266; The B. F. Bruce, 50 Fed. Rep. 123; Olsen *v.* Hunter-Benn, 54 Fed. Rep. 530; Holmes, Common Law, 328. In Behn *v.* Burness, WILLIAMS, J., said: "With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty losses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages." This test was approved in Bentsen *v.* Taylor.

is this day mutually agreed between Messrs. R. Thompson & Sons, owners of the good ship or vessel called the Mary Graham, whereof is master, of the measurement," &c., "now at Sunderland, and Thomas Gillespy, of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, at Sunderland, load from the factors of the said merchant, in the customary manner and in regular turn, a full and complete cargo of Londonderry or Lambton's Wallsend coals, whichever is readiest; which the said merchant binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle," &c. "And, being so loaded, shall therewith proceed to Constantinople for orders, to deliver there, or Stenea or Beicos Bay, or at Varna, or a safe place in the Black Sea, or so near thereunto as she may safely get, and deliver the same, in her regular turn, into craft, steamer, or depot ship, at any wharf or pier where she may safely lie, as may be directed by the consignee, being paid freight on the quantity delivered in the manner after mentioned at the rate of 34*l.* per kiel of 21½ tons, if discharges at Constantinople, Stenea, or Beicos," &c. (other rates for a discharge elsewhere), "in full of all port charges, consulages, pilotages, Ramsgate and Dover dues; the act of God," &c., excepted. "The balance of freight to be paid by an approved bill on London, at three months' date from the production of the consignee's certificate of the right delivery of the cargo at as aforesaid, agreeably to bills of lading, or in cash equal thereto, at charterer's option." Then followed stipulations as to rate of unloading, running days for the same, and demurrage for excess; and other clauses not now material. "One-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less five per cent thereon for insurance, interest, and commission: penalty for non-performance of this agreement, the estimated amount of freight." Signed by defendant and plaintiffs. Averment: That the persons in the said charter-party mentioned and described as Messrs. R. Thompson & Sons, were and are plaintiffs, and that the person therein mentioned and described as Thomas Gillespy was and is defendant. That defendant caused the ship to be loaded with a full and complete cargo of coals, to wit, pursuant to the said charter-party; and that the said ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter-party. That plaintiffs did, and were ready to do, all things necessary on their part, and that all things necessary happened and were done, to entitle plaintiffs, to wit, by their agent in London, to receive, and to render defendant liable to pay to their agent in London, the one-fourth part of the said freight, by the said charter-party agreed to be advanced to the plaintiff's agent in London on the ship having sailed, less 5*l.* per cent thereon for insurance and commission. That the said one-fourth part of the freight, less 5*l.* per cent as aforesaid, amounted to a large, &c., to wit, 214*l.* Yet defendant hath not

paid the same, or any part thereof, to plaintiffs, or to their agent in London.

Second count, for money payable by defendant to plaintiffs for freight for the conveyance by plaintiffs for defendant, at his request, of goods in ships; and for money found to be due from defendant to plaintiffs on accounts stated between them.

Pleas: 1. To the first count: That the said ship did not sail as alleged.

2. To the first count: That the said ship was not, at the commencement of the said voyage, tight, staunch, and strong, and every way fitted for the voyage; and that, by reason of the premises, the said ship and the said cargo of coal were wholly lost.

3. To the first count: That the plaintiff not only wrongfully and negligently sent the said ship, so loaded as in the said first count mentioned, out to sea in an unseaworthy state, and without a proper and sufficient crew to navigate her on the said voyage, and when she was not fitted for the said voyage, and at a time when it was very dangerous for the said ship to proceed to sea; but the defendant says that, after the said ship had been so as aforesaid sent to sea, and while she was on the high seas near to the sea-shore, the plaintiffs wrongfully and negligently caused and permitted the master of the said ship to leave the said ship, and go ashore, and wrongfully and improperly caused and permitted the said ship to be left there, to wit, on the high seas, near to the sea-shore, for a great length of time, without a master, without a proper and sufficient crew to manage and navigate her: during which time the said ship, by reason of the premises, sunk and was wholly lost; and the said cargo of coals was also, by reason of the premises, wholly lost.

4. To the residue of the declaration: Never indebted.

The plaintiffs joined issue on all four pleas, and also demurred to the second and third.

Joinder in demurrer.

The demurrer was argued in last Easter Term.

Atherton, for the plaintiffs. As to the second plea. The question on this demurrer is not whether the facts there stated afford ground for an action by defendant against plaintiffs, but whether they constitute a defence in this action. Now the first averment, that the ship was not seaworthy at the commencement of the voyage, is no answer to an action for freight, inasmuch as whether seaworthy or not she might still perform the voyage and earn freight; and the rules applicable to an ordinary action for freight must be applicable to an action like this for a portion of the freight. But then does the additional averment that the ship was lost by reason of the unseaworthiness aid the defence? Where a defendant sets up damage to himself as an answer to a declaration, he must at least show clear damage on his side equivalent to the damage sustained by the plaintiff. "A cause of action against a plaintiff will be no bar to an action

by him for avoiding circuity of action, when the recovery in both actions is not equal." Note (2) to Turner *v.* Davies.[1] [*Manisty,* who was for the defendant, mentioned Charles *v.* Altin.[2] Lord Campbell, C. J. The litigation is not put an end to unless the damages are equivalent.] Here the damage sustained by the loss of the cargo might be greater or less than the freight. It might happen that the cargo, on arriving at Constantinople, from the state of the market or other circumstances, was not worth the freight. [Erle, J. Suppose the contract to be, if I give you a straw you shall give me 1,000*l.*: the giving of the straw is a condition precedent to getting the 1,000*l.* I think that is the rule applied to such mutual contracts as this.] That would be to construe this charter-party as making the contract to pay the freight in advance dependent on the fulfilment of a warranty. There are three cases: first, where the act of one party is a condition precedent to his calling on the other to act: secondly, where there are simply mutual stipulations; thirdly, where the performance of the two acts is to be simultaneous. The utmost that can be said is, that this is a case of the third kind; but how can the right to the advance of freight be simultaneous with a right to have the use of the ship during the whole voyage which is to ensue? [Erle, J. The case seems to me to fall within the class of simultaneous acts; and if the sailing were illusory, the plaintiff's right would not arise.] The defendant might raise that point on a traverse of the sailing. [Lord Campbell, C. J. There is a great difficulty in resting the defence upon the ground of avoiding circuity; but it is a question whether the freight was ever earned. Erle, J. Suppose the owner of the cargo had said, "I insist on the ship not sailing, for she is not seaworthy." I do not think the actual loss makes any difference.] Suppose the vessel to have sailed on the 1st of January, and not to have been lost till the 1st of March; would not the plaintiffs be entitled to recover the advanced freight? [Erle, J. I am not prepared to answer in the affirmative: the loss is only evidence of the unseaworthiness.] According to that, the slightest want of completeness would be an answer? [Erle, J. The question may be as to a substantial non-performance, as illustrated by the language of Lord Ellenborough in Havelock *v.* Geddes.[3] The condition precedent seems to be here a complex idea; the ship is to sail, being staunch, &c.] Suppose the action to have been brought the day after the ship had sailed, and the plea to have been that she did not sail, being staunch, &c., throwing the loss out of the question. [Crompton, J. There is an old case in Shower[4] which seems to show that where freight is advanced, if the ship be afterwards lost, the freighters cannot have their money back.]

The third plea shows only neglect after the vesting of the right

[1] 2 Wms. Saund. 150 *b.*
[2] 15 Com. B. 46.
[3] See Graves *v.* Legg, 9 Exch. 709, 716.
[4] Probably the Anonymous Case in 2 Show. 283.

of action. That, at most, can be ground only for a cross-action.

Manisty, contra. As to the second plea. The contract was that the ship should sail in a state reasonably fit for the voyage. The quarter of the freight was to be advanced, subject to a deduction in respect of the insurance, interest, and commission, which would fall on the defendant. But the insurance would be worthless unless the ship was seaworthy when she sailed. [Lord Campbell, C. J. It has been held that an advance like this may be insured under the name of freight, though it is not strictly freight.[1] You suggest that the contract contemplates the defendant's keeping up a contract of insurance.] Yes: the deduction is partly for the purpose of enabling the defendant to insure. [Lord Campbell, C. J. Or to stand as his own insurer.] That would be the same thing, so far as relates to the construction of the contract. The contract therefore must be understood to contain a warranty by the plaintiffs that the ship would sail in a proper state. [Erle, J. Perhaps, according to a distinction which has been drawn, it is not so much a warranty as an element of the contract.] Even in the case of an action for the price of goods sold, it is competent to show that there is nothing recoverable because of the breach of a warranty. If it be necessary to inquire whether the plea is good for prevention of circuity of action, it is to be observed that Charles *v.* Altin is distinguishable. It was there held that a plea, in order to show a defence by way of avoiding circuity of action, must show that the cross-claim was for the same sum as that which the plaintiff demands. But that is so here; for the loss of the quarter freight to the defendant is that which the plaintiff, in respect of the identical contract, would have to make good in an action for sailing with the ship in an unseaworthy state; and to make two cross-actions necessary for the adjustment of this claim would be to incur what Lord Denman, in Walmesley *v.* Cooper,[2] calls "the scandal and absurdity of allowing A. to recover against B. in one action, the identical sum which B. has a right to recover in another against A." That something additional might be recovered in the cross-action can make no difference. [Crompton, J. What you would recover in the cross-action would be the value of the goods.] The jury would be bound to give the amount of the loss accruing from the payment of the quarter freight. [Lord Campbell, C. J. That comes to a case of unliquidated damages; where the circuity of action principle applies, the cross-demand ordinarily sounds in debt.] Not invariably, as in the case of a covenant not to sue, or a contract to indemnify. [Lord Campbell, C. J. It is certainly a reproach to our procedure that we cannot, as is done in other countries, always bring cross-demands to be settled at once.] Connop *v.* Levy[3] furnishes a good instance of the defence which a contract to indemnify supplies.

[1] See Hall *v.* Janson, 4 E. & B. 500, 509.

[2] 11 A. & E. 216, 221, 222.

[3] 11 Q. B. 769.

The principle of avoiding circuity of action applies to the third plea as well as to the second.

Atherton, in reply. The amount sought by the plaintiff here possibly might, but need not necessarily, be the same as that which the defendant would recover in a cross-action. Where that is so, the principle of avoiding circuity does not apply. As to the other point, the sailing in a proper condition was not a condition precedent, but was the subject of a mutual stipulation: the quarter freight, if it had been paid on the ship sailing, could not have been recovered back on its being discovered, before the loss of the ship was known, that she had sailed in an unseaworthy state. The only argument that can be raised from the deduction in respect of insurance is, that both parties took for granted that the ship would be seaworthy at the time of sailing; but that does not make the seaworhiness a condition precedent. The sailing is a condition precedent, but not the sailing in any particular state of fitness. *Cur. adv. vult.*

Lord Campbell, C. J., now delivered the judgment of the Court.

This was an action by the owners of a ship on a charter-party, whereby it was agreed between them and the defendant that the ship, being tight, staunch, and strong, and every way fitted for the voyage, should at Sunderland load from the factors of the defendant a full cargo of coals, and, being so loaded, should therewith proceed to Constantinople for orders, and deliver the cargo there or at some port in the Black Sea, being paid freight on the quantity delivered at certain stipulated rates: "one-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less 5 per cent thereon for insurance, interest, and commission." The declaration alleged that the defendant caused the ship to be loaded with a cargo of coals, and "that the said ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter-party;" and that, although the plaintiffs had done every thing to entitle them to an advance of one-fourth of the freight, amounting to 214*l.*, the defendant had not paid the same or any part thereof to their agent in London.

The second plea was, "That the said ship was not, at the commencement of the said voyage, tight, staunch, and strong, and every way fitted for the voyage; and that by reason of the premises, the said ship and the said cargo of coals were wholly lost." To this plea there was a demurrer.

Upon the argument before us, in last Easter Term, the doctrine of circuity of action was relied upon. But we do not think it applicable, for the reasons stated in Charles *v.* Altin. We are of opinion, however, that this plea is a bar to the action, on the ground that it shows that the advance of freight had never become payable.

Freight, generally speaking, is not payable till the goods have been delivered at the port of destination. Here, by special stipulation, one-quarter of the amount was to be paid in advance on a

certain event, viz., the ship having sailed from Sunderland for Constantinople, in pursuance of the charter-party. The charter-party required that when she sailed, she should be "tight, staunch, and strong, and every way fitted for the voyage." If she sailed on the voyage in a seaworthy condition, the merchant was to advance one-fourth of the freight, which he could not recover back if the ship, having so sailed, should afterwards be lost by the perils of the sea without having delivered any part of her cargo. *Pro tanto* the risk was transferred from the shipowners to the merchant; and the arrangement between them was that the amount to be advanced was to be insured by him, as appears clearly from the deduction of 5 per cent for insurance, interest, and commission. By a policy of insurance, the merchant was to be indemnified to the extent of the sum he was to advance. But he could not have the benefit of this indemnity unless, at the commencement of the voyage, the ship was seaworthy. He must be considered to have promised to pay one-fourth of the freight in advance, if, when the ship sailed, she was in such a condition as that a policy of insurance on the freight would attach, and enable him to recover the money back in case of a subsequent loss. But the plea avers that the ship was not seaworthy at the commencement of the voyage, and that, by her unseaworthiness, the cargo of coals was wholly lost. It was argued, for the plaintiff, that the loss after the sailing is for this purpose immaterial, and that, although unseaworthy when she sailed, she might have completed the voyage and delivered the cargo in safety. In that case the full freight certainly would have been earned, and would have been payable: but still the conjuncture never would have arisen upon which a part of the freight was to be paid in advance. For these reasons we think that the second plea is sufficient.

There is a third plea, upon which, as it is demurred to, we are bound to give our opinion. This plea has some introductory observations about the ship having been sent to sea in an unseaworthy state, but it contains no allegation to that effect, and we consider the substance and gist of the plea to be that, after the ship sailed and while she was on the high seas, the plaintiffs were guilty of negligent and improper conduct with regard to the management of the ship, by reason whereof the ship and cargo were wholly lost. This plea, we think, is bad, as it admits that the ship sailed on the voyage from Sunderland in pursuance of the charter-party. If this be true, one-fourth of the freight thereupon became payable in advance; and any subsequent default or misconduct of the plaintiffs would only be the subject of a cross-action.

Judgment for defendant on the second plea; for the plaintiffs on the third.[1]

[1] See Work *v.* Leathers, 97 U. S. 379; Strong *v.* United States, 154 U. S. 632; The Giles Loring, 18 Fed. Rep. 463; The Director, 34 Fed. Rep. 57.

THE ROCHESTER DISTILLING COMPANY *v.* GIOVANNI GELOSO

SUPREME COURT OF CONNECTICUT, June 6–July 6, 1917

[*Reported in* 92 *Connecticut,* 43]

WHEELER, J. The plaintiff, a wholesale, and the defendant, a retail, liquor dealer, on June 3d, 1915, entered into a contract of sale of fifteen barrels of whiskey, by the terms of which contract the plaintiff agreed to sell to the defendant the whiskey in bond and to deliver the same by three certificates, certifying that the whiskey was stored in bond subject to the order of the defendant. The plaintiff further agreed to pay the storage insurance on the same, and to send to the defendant various articles of advertising matter, including six watches, and agreed that if these were not received the defendant should have the right to cancel the notes which the defendant agreed to give as part of his consideration for the purchase.

The defendant, in consideration of the agreements of the plaintiff, agreed to pay $108.98 in cash, and to give to the plaintiff eighteen notes, each for $30, payable serially, thirty days from date, sixty days from date, and so on, until the last note in the series became payable.

The certificates and notes were duly delivered and the $108.98 in cash paid, and thereon the contract became executed and complete, except as to the delivery of the advertising matter.

The purpose of the advertising matter was to call the attention of the public to the fact that this particular brand of whiskey which the defendant advertised was on sale by him.

No time was agreed upon for the delivery of this advertising material. In the absence of an agreement as to the time, the parties concur in the opinion that the law implies the delivery of the advertising material in a reasonable time. What would be a reasonable time for such delivery depends upon the terms of the sale and the circumstances surrounding the sale; and this ordinarily is a question of fact, and the conclusion of the trial court conclusive, unless the time found to have been reasonable was so short or so long that a court must hold as matter of law the finding erroneous. Loomis *v.* Norman Printers Supply Co., 81 Conn. 343, 347, 71 Atl. 358.

Shortly after the contract was entered into the plaintiff began the preparation of the advertising material for shipment and placed its order for the manufacture of the watches with the manufacturer. It is the plaintiff's custom to ship to a customer all of the advertising material agreed to be furnished him, when the order is substantially complied with. It is also its custom to ship this material as soon as it is notified that the retail dealer has withdrawn any of the whiskey from bond, although sometimes the shipment is made at an earlier date. The defendant did not at any time withdraw any of the whiskey from bond.

On July 3d, 1915, the first of the notes was presented for payment and the same refused. At this time none of the advertising matter had been delivered to the defendant. On July 8th, 1915, the defendant notified the plaintiff that by reason of the failure of the plaintiff to deliver the advertising matter he cancelled the notes and asked for the return of the remaining notes and the $108.98, and he thereupon returned to the plaintiff the three certificates for whiskey in bond.

On July 14th, 1915, the plaintiff shipped all of the advertising matter except the watches to the defendant, but upon tender to him he refused to accept it. At the date of maturity of the first note the watches were in process of manufacture; and at the date of maturity of the second note, on August 3d, 1915, and at the time of the institution of this action, the watches had not been completed by the manufacturer.

In his brief the defendant says: "The appeal presents a single question, whether or not, according to the specific terms of this written contract, the defendant did not have the right to refuse to pay any of the notes he had given for the purchase of the whiskey if the material described in the memorandum was not delivered until after the maturity of the first note." The right to cancel the notes at the maturity of the first note would be undoubted, provided the failure to deliver the advertising material prior to that time was unreasonable. There is no relation between the period of delivery of the advertising material and the maturity of the first note, so far as the finding informs us. The defendant did not deem this delivery essential to the beginning of the contract, for he paid in $108.98 at its execution, when he must have known some time would elapse before he received this material. The defendant had no occasion to make use of the advertising material prior to the institution of this action, since at no time did he withdraw any of the whiskey in bond. He at no time requested the delivery of the advertising material. So far as appears, up to the time when this action was begun, the plaintiff had done everything that could be reasonably expected of it to procure the watches.

The conclusion of the trial court, that the defendant was not legally justified in refusing to accept these articles and that the plaintiff was entitled to a judgment for the amount of said notes, necessarily involved a finding that the failure to deliver all of the advertising matter prior to the maturity of the first note, and the failure to deliver the watches prior to the institution of this action, was not unreasonable.

In our view the finding of the trial court cannot be said to be unwarranted in law.

There is no error.

In this opinion the other judges concurred.

ALEXANDER STEWART, RESPONDENT, v. HERBERT A. NEWBURY, ET AL., APPELLANTS

NEW YORK COURT OF APPEALS, March 13–27, 1917

[*Reported in* 220 *New York,* 379]

CRANE, J. The defendants are partners in the pipe-fitting business, and the plaintiff is a contractor and builder. The plaintiff made a bid by letter for certain concrete work in a building in course of erection by the defendants. The defendants accepted by letter this bid.

Nothing was said in writing about the time or manner of payment. The plaintiff, however, claims that after sending his letter and before receiving that of the defendant he had a telephone communication with Mr. Newbury, and said: "I will expect my payments in the usual manner," and Newbury said, "All right, we have got the money to pay for the building." This conversation over the telephone was denied by the defendants.

The custom, the plaintiff testified, was to pay 85% every thirty days or at the end of each month, 15% being retained till the work was completed.

In July the plaintiff commenced work and continued until September 29th, at which time he had progressed with the construction as far as the first floor. He then sent a bill for the work done up to that date for $896.35. The defendants refused to pay the bill and work was discontinued.

The plaintiff claims that the defendants refused to permit him to perform the rest of his contract, they insisting that the work already done was not in accordance with the specifications. The defendants claimed upon the trial that the plaintiff voluntarily abandoned the work after their refusal to pay his bill.

On October 5, 1911, the defendants wrote the plaintiff a letter containing the following: "Notwithstanding you promised to let us know on Monday whether you would complete the job or throw up the contract, you have not up to this time advised us of your intention. . . . Under the circumstances we are compelled to accept your action as being an abandonment of your contract and of every effort upon your part to complete your work on our building. As you know, the bill which you sent us and which we declined to pay is not correct, either in items or amount, nor is there anything due you under our contract as we understand it until you have completed your work on our building."

To this letter the plaintiff replied the following day. In it he makes no reference to the telephone communication agreeing, as he testified, to make the usual payments," but does say this: "There is nothing in our agreement which says that I shall wait until the job

is completed before any payment is due, nor can this be reasonably implied. . . . As to having given you positive date as to when I should let you know what I proposed doing, I did not do so; on the contrary I told you that I would not tell you positively what I would do until I had visited the job, and I promised that I would do this at my earliest convenience and up to the present time I have been unable to get up there."

The defendant Herbert Newbury testified that the plaintiff "ran away and left the whole thing." And the defendant F. A. Newbury testified that he was told by Mr. Stewart's man that Stewart was going to abandon the job; that he thereupon telephoned Mr. Stewart, who replied that he would let him know about it the next day, but did not.

In this action, which is brought to recover the amount of the bill presented, as the agreed price, and $95.68 damages for breach of contract, the plaintiff had a verdict for the amount stated in the bill, but not for the other damages claimed, and the judgment entered thereon has been affirmed by the Appellate Division.

The appeal to us is upon exceptions to the judge's charge. The court charged the jury as follows: "Plaintiff says that he was excused from completely performing the contract by the defendants' unreasonable failure to pay him for the work he had done during the months of August and September. . . . Was it understood that the payments were to be made monthly? If it was not so understood the defendants' only obligation was to make payments at reasonable periods, in view of the character of the work, the amount of work being done and the value of it. In other words, if there was no agreement between the parties respecting the payments, the defendants' obligation was to make payments at reasonable times. . . . But whether there was such an agreement or not, you may consider whether it was reasonable or unreasonable for him to exact a payment at the time and in that amount.

The court further said, in reply to a request to charge: "I will say in that connection, if there was no agreement respecting the time of payment, and if there was no custom that was understood by both parties, and with respect to which they made the contract, then the plaintiff was entitled to payments at reasonable times.

The defendants' counsel thereupon made the following request, which was refused: "I ask your Honor to instruct the jury that if the circumstances existed as your Honor stated in your last instruction, then the plaintiff was not entitled to any payment until the contract was completed."

The jury was plainly told that if there were no agreement as to payments, yet the plaintiff would be entitled to part payment at reasonable times as the work progressed, and if such payments were refused he could abandon the work and recover the amount due for the work performed.

This is not the law. Counsel for the plaintiff omits to call our attention to any authority sustaining such a proposition and our search reveals none. In fact the law is very well settled to the contrary. This was an entire contract. (Ming *v.* Corbin, 142 N. Y. 334, 340, 341.) Where a contract is made to perform work and no agreement is made as to payment, the work must be substantially performed before payment can be demanded. (Gurski *v.* Doscher, 112 App. Div. 345; affd., 190 N. Y. 536; Cunningham *v.* Jones, 20 N. Y. 486; People *ex rel.* Cross *v.* Grout, 179 N. Y. 417, 426; Delehanty *v.* Dunn, 151 App. Div. 695; Smith *v.* Brady, 17 N. Y. 173, 187, 188; Catlin *v.* Tobias, 26 N. Y. 217; Cronin *v.* Tebo, 71 Hun, 59, 61; affd., 144 N. Y. 660; Coburn *v.* Hartford, 38 Conn. 290; Poland *v.* Thomaston F. & O. B. Co., 100 Me. 133; Thompson *v.* Phelan, 22 N. H. 339; Freidman *v.* Schleuter, 105 Ark. 580.)

This case was also submitted to the jury upon the ground that there may have been a breach of contract by the defendants in their refusal to permit the plaintiff to continue with his work, claiming that he had departed from the specifications, and there was some evidence justifying this view of the case, but it is impossible to say upon which of these two theories the jury arrived at its conclusion. The above errors, therefore, canot be considered as harmless and immaterial. (Stokes *v.* Barber Asphalt Paving Co., 207 N. Y. 252, 257; Condran *v.* Park & Tilford, 213 N. Y. 341; Clarke *v.* Schmidt, 210 N. Y. 211, 215.) As the verdict was for the amount of the bill presented and did not include the damages for a breach of contract, which would be the loss of profits, it may well be presumed that the jury adopted the first ground of recovery charged by the court as above quoted and decided that the plaintiff was justified in abandoning work for non-payment of the instalment.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

Hiscock, Ch. J., Collin, Cardozo, Pound and Andrews, JJ., concur; Cuddeback, J., absent.

Judgment reversed, etc.[1]

MARY T. GAIL *v.* ADELBERT D. GAIL

New York Supreme Court, Appellate Division, July 7, 1908

[*Reported in* 127 *New York Appellate Division,* 892]

A contract was made on June 29, 1904, between the plaintiff, a widow, and her son, the defendant, whereby she agreed to release and quitclaim her inherited interest in all the real property owned by her husband, and to execute all papers necessary for the purpose, in consideration of which the son agreed to pay her an annuity of

[1] The statement of facts in the opinion is abbreviated.

$50 a month beginning June 6, 1904. The contract did not fix a date for the conveyances. This annuity was paid regularly from that date to December 1906. Since that time the son has made no payment, and this action is brought to recover nine monthly instalments accruing thereafter. The plaintiff had conveyed to the defendant prior to his cessation of performance her interest in the real estate left by her husband in New York; but, because of a dispute as to whether certain real estate in California was included within the terms of the agreement, had not conveyed and refused to convey her interest in this California property. It was for this reason that the defendant ceased to pay the annuity. The lower court gave judgment for the plaintiff on the ground that no time was fixed by the contract for the conveyances, and that therefore making them could not be a condition precedent to the defendant's obligation. The payment of the annuity for two years was held evidence of the correctness of this construction.

ROBSON, J. [After holding that by the terms of the agreement the plaintiff was bound to convey her interest in the California realty, continued.]

Neither can we at present yield assent to the further claim of plaintiff that, even if she is bound by her agreement to convey to defendant her interest in the California real estate, yet her right to recover of defendant under the agreement for monthly payments to her is not dependent upon her performance of her part of the agreement. It may be incidentally observed that in her complaint she alleges full performance of the contract on her part; and we are of the opinion that this allegation of her complaint was properly included therein as an allegation of fact to be established in proving her cause of action. That she could not have established this fact we have already concluded. But whether or not this was a necessary allegation to be pleaded in her complaint, and, if controverted by the answer, established by proof on the trial, we must hold that (the issue having been tendered by the answer, as it clearly is in this case that plaintiff has not completed her agreement, upon which, as is further claimed in defendant's answer, her right to insist on the performance by defendant of his part of the agreement by paying her the monthly sum which he has agreed to pay, depends), it was incumbent upon her to show such performance of the agreement on her part. It is said in Ewing *v.* Wightman (167 N. Y. 107, 113) that the rule to be applied in the construction of such contracts, as stated in Bank of Columbia *v.* Hagner (1 Pet. [26 U. S.] 455, 464), is firmly settled in our jurisprudence. This rule is that "in contracts of this description the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice and a purchaser might have payment of the consideration money enforced upon him, and

yet be disabled from procuring the property for which he paid it." It is also true that whether or not the mutual and reciprocal agreements of parties to a contract are dependent or independent is determined by the order of time in which by the terms and meaning of the contract their performance is required. (Grant *v.* Johnson, 5 N. Y. 247; Glenn *v.* Rossler, 156 id. 161, 167.) If it appears that their performance is to be concurrent, then they are dependent. If the performance of the whole or a part of the agreement of one party to the contract is to precede in time the performance by the other party of that part of the contract which the former seeks to enforce, then the right of the former to enforce as against the latter performance of the contract is dependent upon his prior performance of his part of the contract or tender thereof. (Grant *v.* Johnson, *supra.*)

The agreement now before us provides that the payment by defendant to the plaintiff of the monthly instalments referred to therein shall be secured by a mortgage given by defendant upon a part of the real estate as to which plaintiff agreed to release her dower. This mortgage has been given. We think the execution of this mortgage, which in effect secured to plaintiff payment of the purchase price of the interests in real estate which plaintiff by the 10th clause of the contract agreed to convey to defendant, was intended by the parties to be concurrent with the performance by plaintiff of her part of the agreement embodied in that clause. If this be true, then, she having accepted the mortgage security, her right to enforce the monthly payments thereby secured is dependent upon her transferring, as she has agreed, the interests in real estate to secure the purchase price of which she had accepted the mortgage. But whether this be the true construction of the contract or not, it is certain that the transfer of plaintiff's interest must be made by her within a reasonable time after the execution of the contract, or certainly within a reasonable time after demand by defendant. It appears that she has already released as the contract provides her dower interest in the New York real estate, but has continuously refused to comply with defendant's demands, made many times before he ceased paying the monthly instalments, that she convey to him her interest in the California property. The time at which she was to comply with and perform her part of the agreement had, therefore, arrived before defendant's default in his payments to her of which she now complains. Her right to insist on further performance by defendant of his part of the agreement was dependent, therefore, on her doing as she had agreed.

It is also urged that defendant by paying the monthly instalments, as he did, without requiring of plaintiff the transfer of her interest in the California real estate, as well as in that in New York, operated as a waiver of his right afterwards to insist on such transfer as a condition of further payments. It may be that it was

such waiver as to each payment actually made by him; but to hold that it also operated as a waiver of this right as to all future payments would result in manifest injustice to him, in appearing that he at all times insisted that he was entitled to a transfer of plaintiff's interest in all the real estate. A waiver as to future payments by defendant cannot be construed from facts like these.[1]

All concurred.

FIRST NATIONAL BANK OF SEATTLE, Appellant, Respondent, *v.* HERMAN M. GIDDEN, Respondent, Appellant

New York Supreme Court, Appellate Division, December 29, 1916

[*Reported in* 175 *New York Appellate Division*, 563]

McLaughlin, J.: The plaintiff appeals from a dismissal of the complaint and defendant from a dismissal of his counterclaim.

Gorman & Co. of Seattle in performance of a contract with the defendant shipped 5000 cases of salmon, drawing a draft for the price thereof (with bill of lading for the salmon attached thereto), to the order of the plaintiff, payable on the arrival of the salmon. This draft with bill of lading attached was sold to the plaintiff which credited Gorman & Co. with its full amount. The draft with the bill of lading was forwarded by the plaintiff to the Irving National Bank of New York for collection. That bank presented the draft to the defendant for payment, which was refused, but after some discussion the defendant wrote an acceptance on the bill dated November 30th, making it payable on or before December 23d in instalments as the salmon was wanted. The salmon was meanwhile stored in a warehouse, and the warehouse receipt attached to the draft in substitution for the bill of lading. On December 23d, the defendant sent to the bank by messenger a certified check for the amount of the draft and offered the check to the bank, simultaneously requesting the surrender of the warehouse receipt. This could not be found at the moment, and the defendant's representative left without paying the draft or tendering unconditionally the certified check. In the afternoon of the same day the receipt was found and the defendant's office was notified thereof by telephone. On the following day the draft with the warehouse receipt was presented at the defendant's office and payment was demanded. The defendant refused payment, saying that he had intended to ship part of the salmon to Porto Rico, but because he could not get the warehouse receipt in time on the previous day, he had been unable to make the shipment. Subsequently the salmon was sold and the proceeds applied in part payment of the draft.

[1] The statement of the case has been abbreviated from the statement in the opinion of the court, and a portion of the opinion has been omitted.

This action was brought to recover the unpaid balance of the draft with interest. The defendant as a defence set up his offer to pay the draft on December 23d, and the fact that he had an order for 2000 cases of salmon which he could not fill by reason of his not having the warehouse receipt. As a counterclaim he set up the amount of freight paid.

The bill of lading and warehouse receipt subsequently substituted for it were held by plaintiff as collateral security for the payment of the draft which it had cashed for Gorman & Co. It was the ordinary transaction of collateral to secure the payment of a bill of exchange, collateral security and nothing else. (Dows *v.* National Exchange Bank, 91 U. S. 618.) When the defendant accepted the draft he thereupon became obligated to pay it irrespective of the collateral which had been given to secure its payment. (2 Rand. Com. Paper [2d ed.], § 1070; Neg. Inst. Law [Consol. Laws, chap. 38; Laws of 1909, chap. 43], §§ 112, 130.) It is not even suggested in the record that at the time the defendant accepted the draft there was any condition imposed upon the acceptance relating to the delivery of the warehouse receipt other than that implied by law where collateral accompanies such instrument. It is true there was a special arrangement permitting the defendant to make partial payments and receive partial deliveries of the salmon, but he did not take advantage of such agreement; on the contrary, he waited until the whole amount of the draft was due, and then simply by informing the bank that he had a certified check for its payment, because the draft and warehouse receipt were not at once delivered, it is contended he was absolutely relieved from liability. Obviously, he could not discharge his obligation to pay the draft in that way. Even though the draft and warehouse receipt were not delivered he still remained liable to the bank upon his acceptance, and his obligation was to pay the amount called for with interest. Upon payment of the draft plaintiff of course was bound to surrender the warehouse receipt, as it would have been to surrender any other collateral upon payment of the debt for which it was pledged. But a failure to surrender the warehouse receipt did not constitute a defense to an action on the acceptance. It may be conceded that tender of the amount due discharged the plaintiff's lien on the salmon, and defendant could have replevied the same; or, if damages had been sustained, interposed a counterclaim, or maintained an action for conversion. (Cass *v.* Higenbotam, 100 N. Y. 248; Reusens *v.* Arkenburgh, 135 App. Div. 75.) But the fact that the collateral was not surrendered when a tender of payment was made of the draft did not relieve the defendant from his obligation to pay. That obligation continued. It was not affected by the tender or by plaintiff's neglect to return the collateral. While defendant set up facts showing a tender, no affirmative relief was asked upon that ground — the only relief sought being a recovery of the freight paid.

There are numerous authorities to the effect that where the drawee of a negotiable bill of exchange has accepted it, he is bound to pay in accordance with the terms of acceptance, and having paid, even under a mistake of fact, he cannot recover back the money paid, though the bills of lading accompanying the draft, and upon which he relied in accepting it, subsequently prove to be fictitious and the goods are never received. (Hoffman & Co. *v.* Bank of Milwaukee, 12 Wall. 181; Goetz *v.* Bank of Kansas City, 119 U. S. 551; First National Bank *v.* Burkham, 32 Mich. 328.)

Nor was the defendant entitled to recover on his counterclaim. Under the agreement with Gorman & Co. the defendant obligated himself to pay the freight on the salmon and in making such payment he was simply carrying out his agreement with that firm.

My conclusion is that the appeal taken by defendant from so much of the judgment as dismissed the counterclaim should be affirmed, and the appeal by plaintiff from so much of the judgment as dismissed the complaint should be reversed and, there being no dispute as to the facts, judgment should be directed in favor of the plaintiff for the amount of the draft, less the proceeds derived from the sale of the salmon, with interest and costs in this court and the court below.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

POUSSARD *v.* SPIERS AND POND

IN THE HIGH COURT OF JUSTICE, April 25, 1876

[*Reported in* 1 *Queen's Bench Division,* 410]

DECLARATION on an agreement by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach: that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas: 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas Sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for 83*l.*

A notice of motion was given accordingly, and a cross order was obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the Court.

Feb. 21. *Percy Gye,* for the plaintiff, cited Cuckson *v.* Stones,[1] Simpson *v.* Crippin, Tilley *v.* Thomas.[2]

Parry, Serjt., (with him *F. H. Lewis*), for the defendants, cited Bettini *v.* Gye, and Graves *v.* Legg. *Cur. adv. vult.*

April 25. The judgment of the Court (Blackburn, Quain, and Field, JJ.) was delivered by

Blackburn, J. This was an action for the dismissal of the plaintiff's wife from a theatrical engagement. On the trial before my brother Field it appeared that the defendants, Messrs. Spiers & Pond, had taken the Criterion Theatre, and were about to bring out a French opera, which was to be produced simultaneously in London and Paris. Their manager, Mr. Hingston, by their authority, made a contract with the plaintiff's wife, which was reduced to writing in the following letter: —

Criterion Theatre, Oct. 16th. 1874.

To Madame Poussard.

On behalf of Messrs. Spiers & Pond I engage you to sing and play at the Criterion Theatre on the following terms:

You to play the part of Friquette in Lecocq's opera of Les Prés Saint Gervais, commencing on or about the fourteenth of November next, at a weekly salary of eleven pounds (11*l.*), and to continue on at that sum for a period of three months, providing the opera shall run for that period. Then, at the expiration of the said three months, I shall be at liberty to re-engage you at my option, on terms then to be arranged, and not to exceed fourteen pounds per week for another period of three months. Dresses and tights requisite for the part to be provided by the management, and the engagement to be subject to the ordinary rules and regulations of the theatre.

E. P. Hingston, Manager.

Ratified:
Spiers & Pond.
Madame Poussard, 46, Gunter Grove, Chelsea.

The first performance of the piece was announced for Saturday, the 28th of November. No objection was raised on either side as to this delay, and Madame Poussard attended rehearsals, and such attendance, though not expressed in the written engagement, was an implied part of it. Owing to delays on the part of the composer, the music of the latter part of the piece was not in the hands of the defendants till a few days before that announced for the production of the piece, and the latter and final rehearsals did not take place till the week on the Saturday of which the performance was announced. Madame Poussard was unfortunately taken ill, and though she struggled to attend the rehearsals, she was obliged on Monday, the 23d of November, to leave the rehearsal, go home and go to bed, and call in medical attendance. In the course of the next day or two an interview took place between the plaintiff and Mr. Leonard (Madame Poussard's medical attendant) and Mrs. Liston, who was the defendants' stage manager, in reference to Madame Poussard's ability to attend and undertake her part, and there was a conflict of testimony as to what took place. According to the defendants' version, Mrs. Liston requested to know as soon as possible

[1] 1 E. & E. 248. [2] Law Rep. 3 Ch. Ap. 61.

what was the prospect of Madame Poussard's recovery, as it would be very difficult on such short notice to obtain a substitute; and that in the result the plaintiff wrote stating that his wife's health was such that she could not play on the Saturday night, and that Mrs. Liston had better, therefore, engage a young lady to play the part; and this, if believed to be accurate, amounted to a rescission of the contract. According to the evidence of the plaintiff and the doctor, Mrs. Liston told them that Madam Poussard was to take care of herself and not come out till quite well, as she, Mrs. Liston, had procured, or would procure, a temporary substitute; and Madame Poussard could resume her place as soon as she was well. This, it was contended by the plaintiff, amounted to a waiver by the defendants of a breach of the condition precedent, if there was one.

The jury found that the plaintiff did not rescind the contract, and that Mrs. Liston, if she did waive the condition precedent (as to which they were not agreed), had no authority from the defendants so to do.

These findings, if they stand, dispose of those two questions.

There was no substantial conflict as to what was in fact done by Mrs. Liston. Upon learning, on the Wednesday (the 25th of November), the possibility that Madame Poussard might be prevented by illness from fulfilling her engagement, she sent to a theatrical agent to inquire what artistes of position were disengaged, and learning that Miss Lewis had no engagement till the 25th of December, she made a provisional arrangement with her, by which Miss Lewis undertook to study the part and be ready on Saturday to take the part, in case Madame Poussard was not then recovered so far as to be ready to perform. If it should turn out that this labor was thrown away, Miss Lewis was to have a douceur for her trouble. If Miss Lewis was called on to perform, she was to be engaged at 15*l.* a week up to the 25th of December, if the piece ran so long. Madame Poussard continued in bed and ill, and unable to attend either the subsequent rehearsals or the first night of the performance on the Saturday, and Miss Lewis's engagement became absolute, and she performed the part on Saturday, Monday, Tuesday, Wednesday, and up to the close of her engagement, the 25th of December. The piece proved a success, and in fact ran for more than three months.

On Thursday, the 4th of December, Madame Poussard, having recovered, offered to take her place, but was refused, and for this refusal the action was brought.

On the 21d of January Madame Poussard left England.

My brother Field, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances, went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants; but he asked the jury five questions.

The first three related to the supposed rescission and waiver. The

other questions were in writing and were: 4. Whether the non-attendance on the night of the opening was of such material consequence to the defendants as to entitle them to rescind the contract? To which the jury said, "No." And, 5, Was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable? To which the jury said, "Yes." Lastly, he left the question of damages, which the jury assessed at 83*l.*

On these answers he reserved leave to the plaintiff to move to enter judgment for 83*l.*

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal, female part (for the prima donna sang her part in male costume as the Prince de Conti) in a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able to perform on the opening and early performances was a very serious detriment to them.

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charter-party in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port, and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo: see per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in Jackson *v.* Union Marine Insurance Co.[1]

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the Court to say whether they, being so found, show a breach of a condition precedent or not. But this course is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

[1] Law Rep. 10 C. P. at p. 141. See Storer *v.* Gordon, 3 M. & S. 308.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Poussard, and if her illness had been a temporary hoarseness incapacitating her from singing on the Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would, no doubt, have been shown that it would have been a ruinous course; and that it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time, during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher pay than the plaintiff's wife, in our opinion it follows, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favor of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide any thing on the cross rule for a new trial.

The motion must be refused with costs.

Motion refused with costs.[1]

[1] Greene *v.* Linton, 7 Porter, 133; Giohan *v.* Dailey's Adm., 4 Ala. 336; Remy *v.* Olds, 34 Pac. Rep. (Cal.) 216; Hickman *v.* Rayl, 55 Ind. 551; Camors *v.* Union Marine Ins. Co., 104 La. 349; Johnson *v.* Walker, 155 Mass. 253; Powell *v.* Newell, 59 Minn. 406; Hubbard *v.* Belden, 27 Vt. 645; Green *v.* Gilbert, 21 Wis. 395, *acc.*; Asplund *v.* Mattson, 15 Wash. 328, *contra*. Temporary illness of an employee, which does not go to the root of the contract, will not prevent him from enforcing the contract. Cuckson *v.* Stones, 1 E. & E. 248; Warren *v.* Whittingham, 18 T. L. R. 508; Ryan *v.* Dayton, 25 Conn. 191; Gaynor *v.* Jones, 104 N. Y. App. D. 35. Or wrongful but slight default. Fillieul *v.* Armstrong, 7 Ad. & E. 557.

BETTINI *v.* GYE

IN THE HIGH COURT OF JUSTICE, January 25, 1876

[*Reported in* 1 *Queen's Bench Division,* 183]

THIRD count, that the defendant was and is the director of the Royal Italian Opera in London, and the plaintiff was and is a dramatic artist and professional singer, and thereupon it was agreed by and between the plaintiff and the defendant, in parts beyond the seas, to wit, at Milan, in Italy, by an agreement in writing in the French language, of which the translation is as follows: —

Royal Italian Opera,
Covent Garden, London.

Year 1875.

The undersigned, Mr. Frederick Gye, gentleman, and director of the Royal Italian Opera in London, of the one part, and Mr. Bettini, dramatic artist, on the other part, have agreed as follows:

1. Mr. Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing-rooms, both public and private, in Great Britain and in Ireland, during the period of his engagement with Mr. Gye.

2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875.

3. The salary of Mr. Bettini shall be 150*l.* per month, to be paid monthly.

4. Mr. Bettini shall sing in concerts as well as in operas, but he shall not sing anywhere out of the theatre in the United Kingdom of Great Britain and Ireland, from the 1st of January to the 31st of December, 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London, and out of the season of the theatre.

5. Mr. Gye shall furnish the costumes to Mr. Bettini for his characters, according to the ordinary usage of theatres.

6. Mr. Bettini will conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, &c.

7. Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.

8. In case Mr. Gye shall require the services of Mr. Bettini at a distance of more than ten miles from London, he shall pay his travelling expenses.

9. Mr. Bettini shall not be obliged to sing more than four times a week in opera. Mr. Bettini, in order to assist the direction of Mr. Gye, will sing, upon the request of Mr. Gye, in the same characters in which he has already sung, and in other characters of equal position. In case of the sickness of other artists, Mr. Bettini agrees to replace them in their characters of first tenor assoluto.

10. Mr. Gye shall have the right to prolong the period limited above upon the same conditions, provided that the period does not go beyond the end of the month of August.

F. GYE, Milan, 14 Dec. 1874.

That the plaintiff did not sing anywhere out of the said theatre in the United Kingdom of Great Britain and Ireland, from the 1st of January, 1875, to the date of the commencement of this action, without the written permission of the defendant, except at a distance of more than fifty miles from London, and out of the season of the said theatre. That the plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, but he did arrive in London on that day; and, save as aforesaid, the plaintiff has always performed his said agreement, and was and is ready

and willing to perform his part of the said agreement, of all which the defendant had notice, and all things were done and happened, and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement and to maintain this action. Yet the defendant did not nor would receive the plaintiff into his said service, but wholly refused so to do, and wrongfully exonerated and discharged the plaintiff from his said agreement, and from the performance of the said agreement on the plaintiff's part, and wrongfully put an end to and determined the said agreement, whereby the plaintiff was damnified.

The defendant pleaded, ninthly, to the third count, that the plaintiff was not in London six days before the commencement of the said engagement for the purpose of rehearsals, nor had the defendant notice before the said six days of the plaintiff's inability to be in London, or that he would not be in London six days before the commencement of his engagement, for the purpose of rehearsals, nor was the plaintiff ready and willing to attend such rehearsals, although it was necessary for him to do so; wherefore the defendant did not nor would receive the plaintiff into his service in the capacity and on the terms aforesaid, which is the breach complained of.

Demurrer to the ninth plea, and joinder.

1875. Dec. 15. *Murphy, Q. C.* (with him *A. L. Smith*), for the plaintiff, in support of the demurrer, contended that the stipulation as to the attendance of the plaintiff at rehearsals six days before the commencement of the engagement was not a condition precedent, inasmuch as the plaintiff was to sing during the engagement at concerts as well as in operas; moreover, the plaintiff was not to sing in London from the 1st of January, and he had abstained from doing so. He cited Robinson *v.* Davidson[1], and MacAndrew *v.* Chapple.

Arthur Wilson (with him *Percy Gye*) for the defendant, contended that the stipulation was a condition precedent. He cited Atkinson *v.* Bell,[2] Graves *v.* Legg, Bradford *v.* Williams, Tilley *v.* Thomas,[3] Jackson *v.* Union Marine Insurance Company.[4]

Murphy, Q. C., in reply. *Cur. adv. vult.*

1876. Jan. 25. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

Blackburn, J. In this case the parties have entered into an agreement in writing, which is set out on the record.

The Court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the Court in Graves *v.* Legg, "to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed." He adds: "One particular rule well acknowledged is,

[1] Law Rep. 6 Ex. 269.
[2] 8 B. & C. 277, 283.
[3] Law Rep. 3 Ch. 61.
[4] Law Rep. 10 C. P. 125.

that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." There was no averment of any special circumstances existing in this case, with reference to which the agreement was made, but the Court must look at the general nature of such an agreement. By the 7th paragraph of the agreement, "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals." The engagement was to begin on the 30th of March, 1875. It is admitted on the record that the plaintiff did not arrive in London till the 28th of March, which is less than six days before the 30th, and therefore it is clear that he has not fulfilled this part of the contract.

The question raised by the demurrer is, not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

This is a question which has very often been raised and the numerous cases on the subject are collected in the first volume of Sir E. V. Williams' Notes to Saunders, p. 554, in the notes to Pordage *v.* Cole, and in the second volume, p. 742, notes to Peeters *v.* Opie.

We think the answer to this question depends on the true construction of the contract taken as a whole.

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the 7th paragraph of the agreement there had been added words to this effect: "And if Mr. Bettini is not there at the stipulated time, Mr. Gye may refuse to proceed further with the agreement;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the

whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing rooms, both public and private, from the 30th of March to the 13th of July, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from the 1st of January to the 31st of December, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from the 1st of January to the 30th of March; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

And, as far as we can see, the failure to attend at rehearsals during the six days immediately before the 30th of March could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts, for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

The defendant must, therefore, we think, seek redress by a cross-claim for damages.

Judgment must be given for the plaintiff.

Judgment for the plaintiff.

EDWARD H. WELLS *v.* WILLIAM CALNAN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, September 1, 1871

[*Reported in* 107 *Massachusetts Reports,* 414]

CONTRACT on a written agreement dated December 22, 1868, by which the plaintiff agreed to sell and the defendant to buy "the farm now occupied by" the plaintiff "and his father" (describing it by metes and bounds), for $3,250, which the defendant agreed to pay on April 10, 1869, and it was provided that "no wood should be cut and removed from the premises save firewood for use in the house," that the plaintiff on receiving payment should execute and deliver to the defendant a proper deed for the conveying and assuring to him of "the fee simple of the said premises," and that for the due performance of the agreement, each party was bound to the other in the sum of $500, "which said sum is to be taken as liquidated damages." The declaration alleged the making of the agreement, and that the plaintiff executed a good and proper deed for conveying and assuring to the defendant in fee simple "the premises described in said agreement," and tendered said deed to the defendant on April 10, 1869, and demanded payment of the $3,250 of the defendant, but that the defendant refused to pay the same, and also refused to pay the $500 as liquidated damages; and that the defendant owed the plaintiff $500. The answer admitted the making of the agreement, but denied the making or tender of a good and sufficient deed, and all the other allegations of the declaration.

At the trial in the Superior Court, before *Pitman,* J., it appeared that the plaintiff tendered a deed in due form on April 10, 1869; that the farm-house and out-buildings on the land were burned on the preceding day; that the defendant for that reason refused to accept the deed or pay the price; that the estate at the time of the contract was worth at least $3,250, but after the fire was worth not more than $2,000; and that the plaintiff had obtained insurance upon the buildings in the sum of $2,000; and had received of the insurance company, in settlement of his claim against them, the sum of $1,600.

The defendant offered to show that the insurance company, before the commencement of this action, offered the plaintiff to take from him a quitclaim deed of the estate, and pay him the full contract price. But the judge excluded the evidence as immaterial.

The plaintiff contended that he was entitled to the $500 as liquidated damages, while the defendant contended that it was to be treated as a penal sum. But the judge ruled "that this question was of no importance, because, if the plaintiff was entitled to demand payment of the contract price notwithstanding the loss of the buildings, he had sustained damage to a larger amount by the defendant's refusal."

The defendant requested the court to instruct the jury that they might consider the amount received by the plaintiff from the insurance company in their estimate of his damages, and might return a verdict for nominal damages only; but the judge instructed them to the contrary.

The jury returned a verdict for the plaintiff in the sum of $546.83, being the amount claimed, with interest; and the case was reported to this Court; if error appeared in the rulings, the verdict to be set aside and a new trial had; otherwise, judgment to be entered on the verdict.

W. G. Bates, for the defendant.

H. Morris & N. T. Leonard, for the plaintiff.

GRAY, J. The principles of law, upon which the rights of the parties to this case depend, appear to have been overlooked at the trial.

When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase-money.

For these reasons, in Thompson *v.* Gould, 20 Pick. 134, where, after the making of an oral agreement for the sale and purchase of a house and land, and the purchaser's entry into possession and payment of part of the price, but before delivery or tender of the deed, the house was destroyed by fire, it was held by this Court, in an elaborate judgment delivered by Mr. Justice Wilde, that he was entitled to recover back the money paid, on the ground of a failure of the consideration.

In Bacon *v.* Simpson, 3 M. & W. 78, the plaintiff had agreed to sell, and the defendant to purchase, a lease for years of a dwelling-house at a certain price, and the furniture, tenant's fixtures, and other property therein at a valuation to be made by appraisers. Before fulfilment of the agreement, or delivery of possession to the defendant, the greater part of the house and the property therein was consumed by fire. The plaintiff brought an action on the agreement, averring readiness to perform from the time of making the agreement and ever since, which was traversed by the defendant. It was held by the Court of Exchequer that by reason of the fire the plaintiff could not perform the agreement, and therefore could not maintain the action.

In Taylor *v.* Caldwell, 3 B. & S. 826, by a written contract one party agreed to give the other the use of a certain music hall on four specified days, for the purpose of holding concerts, with no express stipulation for the event of its destruction by fire. The Court of Queen's Bench held that upon the destruction of the build-

ing on an earlier day, by an accidental fire, both parties were excused from the performance of the contract; and, while recognizing as undoubted the rule that one who makes a positive contract to do a thing not in itself unlawful must perform it or pay damages for not doing so, declared it to be also well settled that that rule is only applicable where the contract is positive and absolute, and not subject to any condition, express or implied; and that where, from the nature of the contract, it appears that the parties must from the beginning have contemplated the continuing existence of some particular specified thing as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the accidental perishing of the thing without the fault of either party.

The doctrine as there stated has been approved in the later English cases. Appleby *v.* Meyers, Law Rep. 1 C. P. 615; s. c. Law Rep. 2 C. P. 651; Boast *v.* Firth, Law Rep. 4 C. P. 1; Robinson *v.* Davison, Law Rep. 6 Exch. 269. And it is illustrated by the previous decisions of this Court, by which it has been held that a person who agrees to build a house on the land of another is not discharged by the destruction of the house by fire before its completion; but that, where one agrees to repair another's house already built, such destruction of the house puts an end to the contract. Adams *v.* Nichols, 19 Pick. 275; Lord *v.* Wheeler, 1 Gray, 282.

In the present case, the agreement between the parties manifestly contemplates the conveyance of the buildings already upon the land as an important part of the subject-matter of the contract. It describes the property to be conveyed as the farm occupied by the vendor and his father, and contains a provision that until the day appointed for the delivery of the deed no wood shall be cut and removed from the premises, save firewood for use in the house. The vendor agrees to execute and deliver a proper deed for the conveying and assuring to the purchaser of the fee-simple "of the said premises." The price stipulated to be paid is an entire sum; and the report states that it appeared in evidence at the trial that the estate at the time of the contract was worth at least that sum, and after the fire was not worth two-thirds as much.

The case differs from those in which a lessee is held liable to pay rent or make repairs according to his covenants, notwithstanding the destruction of the buildings by fire or other accident during the term. There the lessor, by the execution and delivery of the lease, has fully performed the contract on his part; and the lessee, having thereby become the owner of the leasehold interest, must bear the same risk of fire or casualty as any other owner of property, and is not excused from performing his own express covenants. Fowler

v. Bott, 6 Mass. 63; Kramer *v.* Cook, 7 Gray, 550; Leavitt *v.* Fletcher, 10 Allen, 119. But in the case at bar the defendant has only agreed to pay the purchase-money upon tender of a deed of the whole estate contracted for, including the buildings as well as the land; and, the buildings having been wholly destroyed by fire on the day before that appointed for the conveyance, the plaintiff did not and could not tender such a conveyance as he had agreed to make or as the defendant was bound to accept, and was not therefore entitled to maintain any action against the defendant upon the agreement.

It was contended at the argument that this defence was not open under the pleadings. But the declaration alleges that the plaintiff tendered to the defendant a good and proper deed for the conveying and assuring to the defendant the premises described in the agreement; and this allegation is met by a direct denial in the answer.

The result is, that the rulings of the Superior Court were erroneous, because inapplicable to the case; that there has been a mistrial, and that the

Verdict must be set aside, and a new trial had.[1]

ESTHER G. DONLAN, Executrix, *v.* CITY OF BOSTON

Supreme Judicial Court of Massachusetts

January 19–March 3, 1916

[*Reported in* 223 *Massachusetts,* 285]

Braley, J. The plaintiff's testatrix died while in the employment of the defendant as a teacher of manual training in the public schools under a contract at a fixed yearly salary, and this action is brought to recover the balance which would have been due if she had survived the period. It is settled that as performance by her depended upon her personal judgment, ability and efforts, there was an implied condition to which the contract was subject that she should be living and physically able to do the work. Marvel *v.* Phillips, 162 Mass. 399, 401. The contract therefore was terminated by her death before the year had ended. Browne *v.* Fairhall, 213 Mass. 290, 294. Johnson *v.* Walker, 155 Mass. 253.

But as the testatrix died during the summer vacation leaving only one month of the school year unpaid for, the plaintiff contends that this amount, being one twelfth of the salary, is collectible on the basis of the payments she had received each month as shown by her signature on the pay rolls. The contract nevertheless was entire, although the payments were made by monthly instalments.

[1] The authorities are collected in 2 Williston, Contracts, § 927 *et seq.* The doctrine of the Civil Law is discussed, *id.* § 947 *et seq.* See also German Civ. Code, § 446; Titze, Unmöglichkeit, 255–264; Coviello, Caso Fortuito, 137 *et seq.*: 240 *et seq.*

Fullam *v.* Wright & Colton Wire Cloth Co. 196 Mass. 474, 476. Clark *v.* Gulesian, 197 Mass. 492. Moffat *v.* Davitt, 200 Mass. 452, 458. And full payment having been made of all that was due when her death occurred, and further payments being conditional upon the continuance of the contract and not upon whether she was excused from the rendition of services during the succeeding month, the action cannot be maintained. Johnson *v.* Walker, 155 Mass. 253, 255. Pollock on Contracts (Wald's ed.) 543, 548.

By the terms of the report judgment is to be entered for the defendant. *So ordered.*

TICHNOR BROTHERS *v.* JOSEPH EVANS

VERMONT SUPREME COURT, February 25, 1918

[*Reported in* 92 *Vermont*, 278]

POWERS, J. In the spring of 1914, the plaintiffs, through their traveling salesman, Pierce, sold the defendant a bill of goods which included the post card sets here in controversy. At the time of the sale, Pierce told the defendant that if he would buy the sets at the price named, he, Pierce, would not sell like sets to any one else in the town. Upon this assurance, the defendant made the purchase. The plaintiffs did not keep this agreement, but at sometime during the following winter, they sold similar sets to one of the defendant's competitors doing business on the same street. The defendant learned of this about the first of June, 1915, but said or did nothing about it until some two years later and just before the trial below. The suit is brought to recover the balance due on the goods sold, and is defended on the ground that the plaintiffs, having broken the contract in the particular named, are not entitled to recover anything under it.

The trial below was by the court, and it is recited in the findings that there was no evidence from which a determination could be made as to the amount of damage the defendant had suffered by the above mentioned breach of the contract by the plaintiffs. Therefore, the court assessed such damage at one dollar, deducted it from the amount due the plaintiffs, and rendered judgment for the latter for the balance, with interest thereon. To this the defendant excepted. So the only question before us is: Were the plaintiffs entitled to recover anything on the facts found?

The defence is predicated upon the doctrine, frequently approved by this Court, that a breach that goes to the essence of the contract operates as a discharge of it. This rule will not avail the defendant. It is not every breach that goes to the essence. It gives rise to an action for damages, but it does not necessarily justify a refusal to perform. Where, as here, the stipulation goes only to a part of the

consideration, and may be compensated for in damages, its breach does not relieve the other party fro mperformance. In such cases, the broken promise is an independant undertaking and not a condition precedent. Kauffman *v.* Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Lowber *v.* Bangs, 2 Wall. 728, 17 L. ed. 768. See Rioux *v.* Ryegate Brick Co., 72 Vt. at p. 155, 47 Atl. 406. In order to operate as a discharge or give rise to a right of rescission, the partial failure to perform must go to the very root of the contract. Chamberlin *v.* Booth, 135 Ga. 719, 70 S. E. 569, 35 L. R. A. (N.S.) 1223. Keenan *v.* Brown, 21 Vt. 86, is a case of partial failure of performance, and it was held that the defendant therein was not absolved thereby, and was only entitled to recover his damages.

Moreover, when a contract has been partly performed by one party, and the other has derived a substantial benefit therefrom, the latter cannot refuse to comply with its terms simply because the former fails of complete performance. Kauffman *v.* Raeder, *supra;* 13 C. J. 569. "Where a person has received a part of the consideration for which he entered into the agreement," says Mr. Serjt. Williams, "it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it." I Saund. 320d. Hammond *v.* Buckmaster, 22 Vt. 375, is a case of this class, and it was therein held that, inasmuch as each party had received a partial benefit from the contract and could not be placed in *statu quo,* the defendant would have to perform the contract, seeking his damages for the plaintiff's breach by cross action. These holdings are decisive of the case in hand. The stipulation in question was only a part of the consideration of the defendant's undertaking; was subordinate and incidental to its main purpose; its breach is compensable in damages; and the defendant obtained and now holds a substantial benefit under the contract. Other questions argued need not be considered. The judgment below is without error and is *Affirmed.*[1]

LEISTON GAS COMPANY *v.* LEISTON-CUM-SIZEWELL URBAN DISTRICT COUNCIL

IN THE KING'S BENCH DIVISION, January 22–February 1, 1916

[*Reported in* [1916] 2 *King's Bench,* 428]

SCRUTTON, J. An action was brought by the Leiston Gas Company, Limited, whom I call "the gas company," against the Leiston Urban District Council, whom I call "the council," to recover 157*l.* 15*s.*, being three quarterly payments due from the council under an

[1] See also Wilfley *v.* New Standard Concentrator Co., 164 Fed. 421 (C. C. A.); Mark *v.* Stuart-Howland Co., 226 Mass. 35; Rosenthal Paper Co. *v.* National Folding Box & Paper Co., 226 N. Y. 313.

agreement dated June 2, 1911. The defendants alleged that the agreement was for the supply of lighted gas lamps, and that, under Orders from a competent military authority acting under the Defence of the Realm Act and Regulations, such lamps could not be lighted for more than half the first quarter, and for the whole of the second and third quarters sued for. Low, J., held this was no defence and gave judgment for the plaintiffs, the gas company. The defendants, the council, appeal to this Court. The case raises questions of general importance and some difficulty. It is necessary first to appreciate exactly what the agreement sued under provides. It is a contract to last for five years from August 1, 1911, and thereafter till determined by six months' notice terminating on July 31 of any year after and including 1916. The gas company are to provide 105 gas standards and burners with automatic lighters, which remain their property, and to connect them with their mains, and to supply gas and incandescent mantles and chimneys for and light, extinguish, clean, repair, paint, and maintain the said lamps. The lamps are to be lit every night between certain hours varying with sunset and sunrise except on bright moonlight nights. The council is not to pay in proportion to gas supplied, but pays an annual rate for each of the lamps contracted for, reduced on a scale if the gas company reduce their charge for gas. The annual sum is payable quarterly. The quarterly payment, therefore, does not immediately depend on gas supplied; it is the same in the winter and summer quarters, and the same whether the quarter contains many or few bright moonlight nights. It includes an unapportioned sum for supply and maintenance of plant. The gas company are liable for damages or penalty (both words are used) for each lamp they fail to light on any night when it ought to be lit unless the failure is due to circumstances beyond their control; and the parties provide that if there is delay in starting the lamps on August 1, 1911, the penalty shall not apply, but the quarterly payment shall be reduced pro rata. They make no express provision for any reduction from the quarterly payment in case of failure to light from causes beyond the gas company's control; nor do they say whether the company are to suffer a reduction of payment as well as damages in the case of failure to light from causes within their control.

At first sight it is very tempting to say "This is a contract to provide illumination, and the person who does not provide illumination cannot ask to be paid for it." But when the consequences come to be more closely looked into it is not so easy to follow them. The gas company supplies lighted gas for half the first quarter; is then prevented by causes beyond its control from supplying lights till the middle of the second quarter, when the impediment is removed and the supply of light recommences. What is the consequence? Can the council refuse payment for the first quarter and for the second quarter because a full quarter's gas is not supplied in either case;

but does the contract remain in existence, the company being bound to go on as soon as the impediment is removed? Or is there to be an apportionment of the quarter's payments according to the time during which lighted gas is supplied, the time of darkness being written out of the contract? Does the contract come to an end when the supply of lighted gas has ceased for so long a time as to go to the root of the contract, to adopt the language of Blackburn J. in Bettini *v.* Gye,[1] citing with approval Parke B. in Graves *v.* Legg,[2] or to defeat the commercial purpose of the adventure, in the language of Bramwell B. in Jackson *v.* Union Marine Insurance Co.?[3] The attempt to answer these questions suggests that the Court may really be being asked to make an agreement for the parties in a matter which they have not thought of or expressly dealt with. Since the time of Paradine *v.* Jane[4]—see also per Willes J. in Lord Clifford *v.* Watts,[5] when the question was discussed whether a loyal Englishman need pay rent to his landlord when the house he rented had been destroyed by the King's enemies, the "wild Scots" — the distinction has been taken between duties or charges imposed by the law, where the party cannot perform it by events occurring without any default in him, in which case he is excused by the impossibility, and duties created by the agreement of the party, when he is "bound to make good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." Since then the Courts have steadily refused to make contracts for parties, which they might have, and have not, made for themselves, unless the term is so obvious and necessary that it must be implied as a matter of business in such contract: The Moorcock.[6] It is said that the supply of lighted gas has become illegal. This is true for an uncertain time; at any moment the illegality may be removed by peace or changed conditions of war. But the payment of the quarterly sum has not become illegal, and part of it is not for light supplied, but for plant which has been supplied and of which the council has had the benefit. To excuse themselves from breaking the contract to pay, not being an illegal contract, the council must, I think, satisfy the Court of one of two things. Either they must establish that the performance of the contract to supply lighted gas is a condition precedent of the necessity to observe the contract to make a quarterly payment, so that the two contracts are "dependent" and not "independent," to use the language of Pordage *v.* Cole,[7] and of Lord Mansfield in Kingston *v.* Preston, cited in Jones *v.* Barkley;[8] in which case the company, not having supplied lighted gas for the whole of three quarters respectively, cannot sue for payment; or the council must satisfy the Court that, though a mere failure to

[1] 1 Q. B. D. 183, 188.
[2] 9 Ex. 709, 716.
[3] L. R. 10 C. P. 125.
[4] [1670] Aleyn, 26.
[5] [1870] L. R. 5 C. P. 577, 586.
[6] [1889] 14 P. D. 64, 68.
[7] 1 Wms. Saund., 7th ed., p. 549.
[8] [1781] 2 Doug. 684, 689.

supply lighted gas for a short time will not relieve them from payment, there is in this case such an extensive and permanent failure to supply as "goes to the root of the matter, so that the performance of the rest of the contract by the plaintiffs is rendered a different thing in substance from what the defendant has stipulated for": Blackburn J., in Bettini *v.* Gye.[1] First, can it be said that any failure to supply lighted gas, beyond these trifling failures to which the maxim "De minimus" might apply, prevents the company from recovering payment in respect of the quarter in which the failure occurs? Counsel for the defendants, I think, argued that it was so; and though I think they argued that a subsequent acceptance by the council of lighted gas after the failure might waive the breach, they, as I understood them, contended that a fortnight's or a month's failure not waived in this way annulled the whole contract. I cannot take the view that such a failure by itself annuls the contract, or that the contract might be treated as twenty quarterly separate contracts, one of which might be cancelled or blotted out while the rest remained. The payment is a flat rate payment, not a payment by meter for gas supplied; and it includes something for plant supplied and still available. For certain kinds of failure to supply light the parties have provided a remedy in damages, and in other cases a deduction from the quarterly payment. They have not expressly provided for the case of a failure to supply light owing to causes beyond the company's control, and I do not think the Court ought to make such a contract for them, when the consideration for the payment claimed has not wholly failed.

There remains the question whether, though a mere failure to supply will not by itself be sufficient to relieve from payment, a failure of such a lengthy and permanent character as substantially to alter the mode of performance of the contract will have this effect and terminate the contract. I think this must be so, even if the contract is one for a fixed time. I put to the counsel concerned the case of an Act of Parliament being passed, after the agreement had been in operation for a quarter, prohibiting lighting the gas for four years, and asked whether the agreement would remain alive or would be in force for the last nine months only when the operation of the Act had ceased. I think the agreement would be annulled for the reason that a supply of gas for a year in two broken periods would be a totally different thing from the five years' supply which the council bargained for, and that the obligation to supply gas for three months, and again four years later for nine months, for four quarterly payments would be a totally different contract from that which the company entered into. If this principle is granted the question is then one of fact. Is the period from the first total failure to supply on January 26 to the issue of the writ on November 10, that is nine and a half months, sufficient to annul a contract which

[1] 1 Q. B. D. 183, 188, 2 G 2.

is to last for at least five years, perhaps more, and of which the council has already had the benefit for three and a half years? These questions of degree are always difficult, but, treating it as a question of fact, I should hold that there had not at the issue of the writ been sufficient change of character in performance to destroy the contract. For these reasons I arrive at the same result as Low, J., and think that the appeal should be dismissed with costs.[1]

JOHN W. PEAD *v.* LARKIN T. TRULL, ADMINISTRATOR

SUPREME JUDICIAL COURT OF MASSACHUSETTS, April 1–May 19, 1899

[*Reported in* 173 *Massachusetts,* 450]

HOLMES, J. This is an action of contract upon an indenture by which, in consideration of the plaintiff Pead's covenant, Whitman covenanted to convey certain land to Pead within forty-five days, and Pead, in consideration of Whitman's covenant, covenanted to convey certain land to Whitman within forty-five days, and further covenanted to pay him fifteen hundred dollars upon receiving a deed of Whitman's land; and to give Whitman a note for three thousand dollars secured by second mortgage on the Whitman land and to assume and pay a first mortgage with interest from the date of the conveyance to him. Then followed mutual covenants to pay five hundred dollars as indemnity and liquidated damages in case of failure to perform the agreement. Before the forty-five days elapsed Whitman died, and on the last day, no administrator having been appointed, the plaintiff, to save his rights, tendered performance on his side to the widow of Whitman and to the defendant Trull, who had been Whitman's attorney in other matters and who afterwards was appointed administrator, but, apart from other technical difficulties, the deed tendered by the plaintiff ran to Whitman, the dead man.

It appears to us that the covenants ought to be construed as mutually dependent. There is some little suggestion of independence to be drawn from them, but nothing on the whole strong enough to overcome the presumption that in an exchange performance on the two sides is to be concurrent. Goodisson *v.* Nunn, 4 T. R. 461.[2] In actions upon such covenants the plaintiff must show performance on his side, or readiness to perform, and a refusal by the other party. Brown *v.* Davis, 138 Mass. 458; Hapgood *v.* Shaw, 105 Mass. 276, 279; Smith *v.* Boston & Maine Railroad, 6 Allen, 262, 273. But in a case like the present, under our statutes the administrator was the natural and proper person to perform the contract, as he

[1] Lord READING, C. J. and WARRINGTON, J., also delivered opinions for affirmance.

[2] Summers *v.* Sleeth, 45 Ind. 598, *acc.*

was the one to receive the money from the plaintiff. Pub. Sts. c. 142, § 1. It was impossible to demand performance of him, or to offer it to him within the forty-five days, and therefore the plaintiff was not in default for not having done so, and the contract was not discharged at the end of that time. Of course the contract was not discharged by the death of a party.

The plaintiff's tender, although defective as such, is evidence that he was ready and willing to perform and that the administrator knew that he was. But it did not put the administrator in default. All that appears is that the latter has not caused the land to be conveyed to the plaintiff. It does not appear that he ever has repudiated the agreement. On the other hand, it does not appear that the plaintiff ever has renewed his offer since the administrator was appointed. Assuming as we do that the plaintiff had a right to demand performance within a reasonable time after the appointment of an administrator, it does not appear that the judge has not found that he suffered more than a reasonable time to elapse, and so lost his rights. We are compelled by the terms of the report to direct a judgment on the finding. If in fact the finding was based solely on the ground that the plaintiff had lost his rights at the end of forty-five days, that ground is insufficient, and the rescript of this court will not prevent an application to the judge who heard the case to reopen the cause, or to enter what judgment he deems proper under this decision. Platt *v.* Justices of the Superior Court, 124 Mass. 353, 355; Kenerson *v.* Colgan, 164 Mass. 166. *Judgment on the finding.*[1]

NATIONAL MACHINE AND TOOL COMPANY *v.* STANDARD SHOE MACHINERY COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS, November 21, 1901–May 19, 1902

[*Reported in* 181 *Massachusetts,* 275]

HOLMES, C. J. This is an action of contract upon one or two small claims and for the breach of a contract made in March, 1900, by certain letters, in which the plaintiff undertook to manufacture certain portions of a patented machine, according to a schedule attached to the defendant's order. This last is the main source of trouble. With regard to payment the plaintiff wrote: "If you should favor us with an order for a considerable number of these parts, we would bill them up to you as they were finished, and would merely ask that the bills be settled promptly as they came to you." At a later stage of the negotiation the plaintiff wrote that it should expect

[1] It is often said, in contrasting the procedure of law and equity, that in actions at law time is always of the essence, whereas equity frequently grants specific performance in spite of delay. See 2 Williston, Contracts, § 846, *et seq.*

the defendant "to arrange it so that the bills would be approved promptly, and payment made on same at once, so that we may expect payments coming in rapidly after we have got well started on the contract, thus preventing us from having too large an amount of money tied up in the work." In this letter the plaintiff also wrote that it expected the defendant "to fully protect us from any suits that might be brought against us while we are on this work, on account of patents." It is denied that this letter was a part of the contract. We see no sufficient reason for the denial.

About May 1, 1900, the plaintiff was sued and demanded a bond with surety, as protection under its agreement. The defendant agreed to give a bond, but on May 21 declined to furnish a surety, and this is relied on by the plaintiff as one breach of the defendant's undertaking. We think it so plain that the defendant was not bound to give a surety that we dismiss this part of the case without further mention.

On May 17, 1900, the plaintiff having finished one item on the defendant's order, of sixty adjusting screws, sent a bill for the price, $90. The bill bore a stamped notice that "all claims for corrections in this bill must be made within ten days from date." It was understood by the plaintiff that if the bill was approved by the proper man it would be sent on to New York to be paid. Three or four days later there was a conversation in the defendant's Boston office, it was suggested that this bill ought to be paid immediately on presentation, and complaint was made with regard to another overdue account of nearly seven hundred dollars ($697.23). There were apologies and further delays, complaints, and explanations, the defendant's representative always explaining the delay as accidental, and finally, on May 28, stating that the check was ready but had been retained for entry as the bookkeeper was away. This last seems to have been true. On May 29 the plaintiff, hearing that a check had not come on, notified the defendant that "as you have not lived up to your agreement with us in relation to the work we are doing for you, we shall stop all of your work to-day," and stopped. Later efforts to come to an understanding failed.

The plaintiff when it stopped work had finished another small item of $24, and on May 31 offered to deliver these goods as well as those for which the bill for $90 had been sent, but the defendant declined to receive them. May 31 was the date of the writ, and the plaintiff very candidly says that the offer was made after suit was brought. The plaintiff seeks to recover as damages for the defendant's alleged breach the cost of the finished parts, and also the value of stock and castings and a large amount of work upon parts never delivered or completed.

The case was sent to an auditor. He found that the defendant did not repudiate the contract, and that the delay in payment did not justify the plaintiff in stopping work. The judge of the Superior

Court adopted his rulings and findings, although finding in addition that the provision for prompt payment of bills for finished work was material, and that payment was not made promptly, and expressing a doubt whether the plaintiff was not justified in refusing to proceed.

Although the contract was not repudiated by the defendant, we are of opinion, notwithstanding Winchester *v.* Newton, 2 Allen, 492, which perhaps was not intended to establish a different general rule (see also Newton *v.* Winchester, 16 Gray, 208), that there might have been such a breach by failure to pay, as, however honest and however little it expressed a repudiation, would warrant a refusal to go on with the work. Bloomer *v.* Bernstein, L. R. 9 C. P. 588. See Stephenson *v.* Cady, 117 Mass. 6. There is nothing to the contrary in Daley *v.* People's Building, Loan & Saving Association, 178 Mass. 13, 18. What is said there refers to an attempt to avoid a contract *ab initio* for a refusal to pay money due upon an executed consideration, when to make that payment is all that remains to be done on that side.

We may say further that for the purposes of this decision it is not necessary to consider Lord Selborne's somewhat sweeping suggestion in Mersey Steel & Co. *v.* Naylor, 9 App. Cas. 434, 439, that when delivery of an instalment of goods under an entire contract is to precede payment for the goods delivered, as payment cannot be a condition precedent of the entire contract, it cannot be a condition precedent to the deliveries remaining to be made, at least without express words. See Norrington *v.* Wright, 115 U. S. 188, 210. In this case both parties have assumed that the plaintiff could put the defendant in default without delivery merely by sending a bill for an item when it was finished, so that Lord Selborne's logical difficulty, if there is anything in it, does not apply.

The question before us therefore is whether the defendant's failure to pay $90 promptly was a breach going to the root of the contract, — a breach so important as to warrant the plaintiff in refusing to go on without defeating his own right to recover upon it or rescinding the contract. My Brother Loring and I have not been able to reach a clear conviction that it was such a breach, in view of the smallness of the sum, the indefiniteness of the terms of the contract as to the time for payment (see Harnden *v.* Milwaukee Mechanics' Ins. Co., 164 Mass. 382; Parker *v.* Middlesex Mut. Ass. Co., 179 Mass. 528, 531), the shortness of the delay, and some other circumstances. Of course not every trifling breach of contract excuses the other side from further performance. Honck *v.* Muller, 7 Q. B. D. 92, 100; Mersey Steel & Iron Co. *v.* Naylor, 9 App. Cas. 434, 444; Dubois *v.* Delaware & Hudson Canal Co., 4 Wend. 285, 289; Wright *v.* Haskell, 45 Maine, 489, 492; Weintz *v.* Hafner, 78 Ill. 27, 29; Worthington *v.* Gwin, 119 Ala. 44, 54.

But my brethren are of opinion, and I dare say wisely, upon the findings, that the plaintiff was warranted in its course. The plain-

tiff's contract necessitated a considerable preliminary outlay, and would necessitate further expenditures in carrying out its part. At the time it was paying nearly seventy dollars a day. Prompt payment for goods as finished took the place of payments on account. The plaintiff was sensitive, and had a right to be so, at any appearance of uncertainty as to the stipulated payments being made. It had a further ground of anxiety in the suits brought against it for infringement of patents, when it had only the defendant's personal guaranty to protect it. Under such circumstances, the failure to pay the other bill for nearly seven hundred dollars, gave a character to the failure to pay the smaller sum which was due, and imparted a significance to the delay that otherwise it might not have had. A failure to pay a small sum promptly because of difficulty in raising the money is not the same thing as, and may have a greater effect than, a similar failure simply because of the absence of a bookkeeper or of some misunderstanding between the defendant's Boston and New York houses.

The first count was upon a claim for $209.38 outside the contract thus far discussed. The auditor finds for the plaintiff, but for $129.15 only. The plaintiff demands the larger sum, notwithstanding the finding, on the ground that when seeking to reduce the plaintiff's attachment the defendant expressed a willingness to pay for all work that had been completed, that the plaintiff's counsel stated what that work amounted to so far as he knew, that thereupon the judge made an order dissolving the attachment upon the payment of that amount to the sheriff and the giving of a bond for $5,000 more, and that the defendant paid the sum, which included the item of $209.38. This transaction was not a tender, and did not fall within the rule laid down in Currier *v.* Jordan, 117 Mass. 260, and Bouvé *v.* Cottle, 143 Mass. 310, 315. It would seem to have been only a substitution of securities in the sheriff's hands, and to have left the correctness of the figures open to trial with the rest of the case.

The second count also was for items outside the contract, and only one of them was disputed. This was for some articles not finished because the defendant, after the plaintiff refused to go on with its contract, took away jigs and tools which it had furnished the plaintiff under the contract, and also the unfinished articles. There is nothing in the report which necessarily implies that the failure to finish the articles was due to the plaintiff's fault, or indeed to any other cause than the defendant's removal of them. Therefore we cannot say that the auditor's finding was wrong.

A part of the damages to be recovered by the plaintiff on the larger contract will be for work done under it. Goodman *v.* Pocock, 15 Q. B. 576, 580. Therefore one other question requires a few words. The defendant made a tender on May 31 of the amount then due, including the $90 claimed under the contract, which was refused. But this tender has not been pleaded or kept good, even if, as does

not appear very clearly, it embraced the sums now recovered. Therefore it does not prevent the recovery of interest and costs. The answer was a general denial. Brickett *v.* Wallace, 98 Mass. 528, 529; Grover *v.* Smith, 165 Mass. 132. See Noble *v.* Fagnant, 162 Mass. 275, 286. The payment to the sheriff was not a payment into court or an admission that the sum paid was due, as we have said and as the plaintiff contends. In Suffolk Bank *v.* Worcester Bank, 5 Pick. 106, the amount tendered was deposited in a bank to the order of the plaintiff, and in Goff *v.* Rehoboth, 2 Cush. 475, the defendant was a town, and the treasurer might be presumed to have kept the money on hand in obedience to the order of the selectmen. In both the tender was set up and the money brought into court. See Pub. Sts. c. 168, § 23; Town *v.* Trow, 24 Pick. 168, 169; Sanders *v.* Bryer, 152 Mass. 141. There was another tender after suit brought, but that did not comply with Pub. Sts. c. 168, § 24, and is not relied upon. *Case to stand for assessment of damages.*[1]

HENRY W. GREEN, Respondent, *v.* THOMAS EDGAR and Others, Appellants

New York Supreme Court, General Term, June Term, 1880
[*Reported in* 21 *Hun,* 414]

Judgment reversed, and new trial ordered before another referee, costs to abide event. *Held,* that a servant may be discharged by the master from his employment, provided a sufficient cause actually exists, whether the same was known to or assigned by the master at the time of the discharge or not; and that the special findings show that sufficient grounds for the discharge existed at the time of the discharge.[2]

[1] See also Eastern Forge Co. *v.* Corbin, 182, Mass. 590. Compare Franklin *v.* Miller, 4 Ad. & E. 599.

[2] Baillie *v.* Kell, 4 Bing. N. C. 638; Spotswood *v.* Barrow, 5 Ex. 110; Willets *v.* Green, 3 C. & K. 59; Boston Deep Sea Fishing Co. *v.* Ansell, 39 Ch. D. 339; Abendpost Co. *v.* Hertel, 67 Il. App. 501; Odeneal *v.* Henry, 70 Miss. 172; Allen *v.* Aylesworth, 58 N. J. Eq. 349; Arkush *v.* Hanan, 60 Hun, 518; McIntyre *v.* Hockin, 16 Ont. App. 501; Tozer *v.* Hutchison, 12 N. B. 548, *acc.* But see Cussons *v.* Skinner, 11 M. & W. 161; Strauss *v.* Meertief, 64 Ala. 299, 310.

In Higgins *v.* Eagleton, 155 N. Y. 466, 472, an action by one entitled to a conveyance of real estate, the court said: "The plaintiff, on the law day, having made specific objections to the title, which were unfounded, could not subsequently raise a new objection, even if it was valid where, as in this case, it was one that could have been obviated by the defendant. Benson *v.* Cromwell, 6 Abb. Pr. Cas. 83, 85." See also Paisley *v.* Wills, 18 Ont. App. 210.

BAKER *v.* HIGGINS

New York Court of Appeals, June, 1860

[*Reported in* 21 *N. Y.* 397]

Appeal from the Supreme Court. Action to recover for brick sold and delivered. The trial was before a referee, who received parol evidence of a contract for the sale of the brick. It substantially appearing that the contract was put in in writing, the defendant moved that the parol evidence of its tenor should be stricken out. To the referee's refusal to strike out the evidence, and to his refusal to nonsuit the plaintiff, the defendant took exceptions. The referee, in his finding of facts, found, in accordance with the parol evidence, that the defendant agreed to pay for the brick as fast as delivered. Judgment for the plaintiff, upon his report, having been affirmed at general term, in the third district, the defendant appealed to this court.

Roswell A. Parmenter, for the appellant.

John B. Bronk, for the respondent.

Welles, J. On the trial before the referee, the plaintiff gave evidence tending to show that, by the contract between him and the defendant for the sale and delivery of the brick in question by the former to the latter, the brick was to be paid for as they were delivered. It also appeared, on the part of the plaintiff, that, at the close of the conversation between the parties by which the contract was negotiated, the plaintiff wrote something on a piece of paper and handed it to the defendant, upon which the parties separated. None of the plaintiff's witnesses were able to state what the writing contained. The defendant produced and identified the paper, which turned out to be as follows: "I will deliver John Higgins 25,000 pale brick, on the dock at East Troy, for $3 per M, and 50,000 hard brick, at the same place, at $4 per M, cash. E. W. Baker, Coxsackie." This, I think, was a valid agreement, and must be deemed and taken as the agreement then made between the parties in relation to the brick, and under which a part was afterwards delivered.

Not long after this agreement, the plaintiff delivered to the defendant, at Troy, under the written contract, a cargo of brick, consisting of 10,500 hard and 10,500 pale bricks, and demanded payment for that quantity, which the defendant refused until the whole was delivered. This, I think, he had a right to do. The contract was entire, to deliver 75,000 bricks; and the plaintiff was not entitled to pay for any part until the whole was delivered, or until he was ready and offered to deliver the balance, which the plaintiff has not done. The action was brought for the contract price of the 21,000 bricks delivered; and the referee found, contrary to the legal import of the written agreement, that the brick was payable on delivery, as the same should be delivered. For this error the judgment should

be reversed, and a new trial directed in the court below, with costs to abide the event.

Selden, Clerke, and Wright, JJ., dissented; all the other judges concurring, *Judgment reversed, and new trial ordered.*[1]

HOARE and Others *v.* RENNIE and Another

In the Exchequer, November 14 & 16, 1859

[*Reported in* 5 *Hurlestone & Norman,* 19]

Declaration. First count: That, on the 21st of April, A.D. 1857, the defendants agreed to buy of the plaintiffs, and the plaintiffs then agreed to sell to the defendants, about 667 tons of hammered Swede bar iron of certain sizes, then agreed on between the plaintiffs and the defendants, the said iron to be shipped from Sweden in the months of June, July, August, and September next, and in about equal portions each month, at 15*l.* 10*s.* per ton, delivered in good condition ex ship, on arrival in the port of London; and it was thereby then further agreed, amongst other things, that no shipment should exceed 150 tons, which should be in proportionate quantities of each size; but that, if any variation therein, it should not exceed one ton, and such variation to be corrected in subsequent shipments; that sellers should have the option of commencing shipments in May, 1857, and also of completing the whole by the end of July, 1857; that ships' names should be declared as soon as known to the sellers; that if any should be lost on the voyage the quantity lost should be null and void; and that there should be discount at the rate of two and a half per cent for cash against each delivery. Averments: That plaintiffs had done all things necessary on their part to be done, &c.; and though all things had happened and all times had elapsed to entitle them to have the said iron accepted, yet the defendants have wholly refused to accept the said iron or any part thereof, or to pay for the same according to the terms of the said agreement, whereby the plaintiffs lost divers profits, &c.

Second count: That on the 21st of April, A.D. 1857, the plaintiffs

[1] First Nat. Bank *v.* Perris Irrigation District, 107 Cal. 55; Haslack *v.* Mayers, 26 N. J. L. 284; Catlin *v.* Tobias, 26 N. Y. 397; Nightingale *v.* Eiseman, 121 N. Y. 288; Witherow *v.* Witherow, 16 Ohio, 238; Easton *v.* Jones, 193 Pa. 147, *acc.* See also Hamilton *v.* Thrall, 7 Neb. 210; 2 Williston, Contracts, § 862.

Compare Aultman & Taylor Co. *v.* Lawson, 100 Iowa, 569; Gill *v.* Johnstown Lumber Co., 151 Pa. 534; McLaughlin *v.* Hess, 164 Pa. 570.

Contracts of service for a specified term are held severable when the wages can be construed as payable at specified shorter periods. Taylor *v.* Laird, 1 H. & N. 266; Button *v.* Thompson, L. R. 4 C. P. 330; Davis *v.* Preston, 6 Ala. 83; Jones *v.* Dunton, 7 Ill. App. 580; White *v.* Atkins, 8 Cush. 367; Chamblee *v.* Baker, 95 N. C. 98; Markham *v.* Markham, 110 N. C. 356; Matthews *v.* Jenkins, 80 Va. 463; La Coursier *v.* Russell, 82 Wis. 265.

Compare Decamp *v.* Stevens, 4 Blackf. 24; Davis *v.* Maxwell, 12 Met. 286; Lantry *v.* Parks, 8 Cow. 63; Monell *v.* Burns, 4 Denio, 121; Larkin *v.* Buck, 11 Ohio St. 561; Diefenback *v.* Stark, 56 Wis. 462.

agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, about 667 tons of hammered iron, upon the terms in the first count mentioned; and that from the time of the making the agreement continually until after the refusal, notice, and discharge hereinafter mentioned, the plaintiffs did and performed all conditions precedent, and all things were done, and all times elapsed, necessary to entitle them to the performance of the agreement on the part of the defendants; and that at and after the refusal, notice, and discharge hereinafter mentioned, they were ready and willing to perform the agreement on their part; and although the plaintiffs, in part performance of the said agreement, did, in June, A.D. 1857, ship a certain portion of the said iron, and did, in further performance of such agreement, and within a reasonable time after such shipment, tender to the defendants, and offered to deliver to them the said portion of iron so shipped as aforesaid, yet the defendants refused to accept the said portion of iron so tendered and offered, and thenceforth wholly refused to accept the same or any of the residue of the said iron, and gave notice to the plaintiffs that they would not accept the residue of the said iron; and the defendants thenceforth wholly refused to observe the agreement on their part, and wholly discharged the plaintiffs from the further execution and performance of the agreement by them; and wholly waived such execution and performance; whereby, &c.

Third plea to the first count: That the plaintiffs did not avail themselves of the option given to them by the agreement of commencing shipments of the iron in the month of May; and that the plaintiffs in the month of June shipped from Sweden, on board a certain vessel, a quantity of the said iron so contracted for, to wit, 21 tons, 6 cwt., 1 qr., being a much less quantity than was required to be shipped during the said month of June according to the terms of the said contract, and gave notice to the defendants that the said iron was to be part of the iron so agreed to be sold as aforesaid; that the plaintiffs failed to complete the shipment for the month of June, according to the terms of the contract, and were never ready and willing to deliver to the defendants such a quantity of iron, shipped from Sweden in June, as is specified in the said contract, although none of the iron was lost during the voyage; and were not ready and willing to deliver to the defendants the said small quantity of iron which had been shipped during the month of June, until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the said agreement with reference to the quantity of iron to be shipped in June; and that the defendants, having notice of all the premises in this plea mentioned, did afterwards refuse to receive the said quantity of iron so shipped as aforesaid during the month of June, and did give notice to the plaintiffs that they refused to receive the residue of the said iron.

The sixth plea, to the second count, was similar to the third plea.

The plaintiffs demurred to the third and sixth pleas, and the defendants joined in demurrer.

POLLOCK, C. B. We are all agreed that the defendants are entitled to judgment upon the pleas. The foundation of my opinion is shortly this, that a man has no right to say that which is a breach of an agreement is a performance of it. On that ground, this case is distinguishable from almost every other which has been cited. It does not turn upon any question of condition precedent. The only question is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party. The plaintiffs contracted with the defendants to ship a large quantity of iron in June, July, August, and September, about one-fourth part in each month; but instead of shipping about 160 tons in June, as they should have done, they shipped little more than twenty tons, as a performance of the contract. The first count states that the plaintiffs performed all things necessary on their part to be performed, that they were ready and willing to do all things which according to agreement it was necessary they should be willing to do, and that all things happened to entitle the plaintiffs to a performance of the agreement on the part of the defendants. This is denied by the plea. The second count states that the plaintiffs, in part performance of the contract, shipped a certain portion of the iron, and in further performance of the agreement tendered and offered to deliver the said portion so shipped, yet defendants refused to accept the same. The pleas raise the question whether the defendants were bound to accept and pay for what was sent and tendered; the plaintiffs having, in June, shipped from Sweden a quantity much less than they were bound to have shipped, and the defendants having insisted that this was a breach of the contract, and given notice that they refused to accept the residue. The pleas expressly state that the plaintiffs were not ready to deliver such a quantity of iron shipped from Sweden in June as is specified in the contract, and were not ready and willing to deliver the small quantities shipped until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing to perform their part of the agreement. The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that the sending of which was a breach and not a performance of the agreement. The argument on the part of the plaintiffs is that this was not a condition precedent. I do not think that is the test. It was said that if the plaintiffs had sent the one-hundredth part, instead of one-fourth part, in June, the defendants' remedy would have been by a cross-action. The case was put of the plaintiffs sending a short quantity after one shipment had been

accepted. Possibly that might have made a difference. Where a person has derived a benefit from a contract he cannot rescind it, because the parties cannot be put *in statu quo*. Probably, therefore, in such case the defendants could not have repudiated the contract, and must have been left to their cross-action. Here, however, the defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.

Judgment for the defendants.[1]

FREETH AND ANOTHER *v.* BURR

IN THE COMMON PLEAS, January 14, 1874

[*Reported in Law Reports, 9 Common Pleas,* 208]

. . . [2]THIS cause was tried before Brett, J., at the Sittings in London after last Hilary Term. The plaintiffs and the defendant were iron-merchants and manufacturers. In November, 1871, the plaintiffs agreed to buy of the defendant 250 tons of pig-iron, and on the 28th of that month bought and sold notes were exchanged. The bought-note, signed by the plaintiffs, was as follows: —

LONDON, 28th November, 1871.

Bought of Messrs. D. M. Burr & Co. two hundred and fifty tons of pig-iron, at fifty-six shillings per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash 14 days after delivery of each parcel.

The market was rising, and early in February the plaintiffs wrote to the defendant, remonstrating with him for not having delivered any of the iron. About the 15th of that month 10½ tons were sent alongside the plaintiffs' wharf; and on the 20th the plaintiffs wrote to the defendant as follows: —

We are much surprised you should have sent such a paltry lot as 10 tons on account of contract for 250 tons which should have been delivered last December. We must request you will give us a definite time for delivery of at least 50 tons, which must be delivered at once, or we shall have again to buy against you.

On the 17th of May, 1872, the defendants wrote to the plaintiffs as follows: —

We are informed that the lighter which we sent with 30 tons Kentledge pig-iron to your wharf on the 10th instant is still lying there unloaded, and that this has arisen

[1] Watson and Channell B. B. delivered concurring opinions.

through an undue preference being allowed by you to other barges in discharging, or from some other cause for which you are to blame. We have, therefore, to intimate that we shall hold you liable for demurrage from and after 13th instant.

On the 18th the plaintiffs wrote to the defendant: —

In answer to yours of the 17th instant, your barge has been discharged some days. Do you intend to deliver the remainder, or shall we buy against you?

To this the defendant replied on the 21st: —

It is our intention to deliver remainder of pig-iron, and do not wish you to buy against us. We inclose invoice of last lot.

On the 29th of May, 126 tons in all having by that time been delivered, the defendant wrote to the plaintiffs: —

Would you kindly forward us cheque in payment of the ballast iron we have delivered to you, and we shall proceed at once to send on the remainder.

The plaintiffs, under an erroneous impression that they were entitled to set off against the defendant's claim any loss which they might incur in case the defendant should fail to deliver the remainder of the iron contracted for, refused to pay for the 125 or 126 tons which had been delivered; and their attorney, in reply to a letter from the defendant's attorney demanding payment, put forward a claim for 250*l.*, being 2*l.* per ton on the 125 tons undelivered.

On the 12th of June, the defendant's attorneys wrote to the plaintiffs' attorney: —

We hardly think it necessary to refer to your clients' claim for 250*l.*, as it is purely hypothetical and could not possibly arise, as your clients by their own default have obliged our client to refuse to make any further delivery of iron. We must request your clients' immediate attention to the settlement of amount (352*l.* 15*s.* 10*d.*) mentioned in our letter of the 5th instant.

The plaintiffs paid ultimately (but not until after an action had been brought for it) for the first 125 tons of iron; and this action was brought against the defendant for the breach of his contract in refusing to deliver the second 125 tons.

On the part of the defendant, it was contended that the plaintiffs' refusal to pay for the first parcel of the iron amounted to an abandonment of the contract by them, and absolved the defendant from his obligation further to perform it on his part. Hoare *v.* Rennie was relied on.

The learned judge ruled that the mere refusal by the plaintiffs to pay for the first 125 tons did not exonerate the defendant from his obligation under the contract to deliver the second 125 tons, and consequently that the plaintiffs were entitled to recover such damages as they had sustained from the non-delivery; and he directed a verdict to be entered for the plaintiffs for 148*l.* 16*s.*, reserving leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the refusal by the plaintiffs to pay for the iron delivered amounted to an abandonment of the contract.

Garth, Q. C., in Easter Term last, obtained a rule nisi accordingly.

Watkin Williams, Q. C., and *E. Clarke*, who appeared to show cause, were stopped by the Court.

Garth, Q. C., and *Philbrick*, in support of the rule. The iron was not delivered according to the strict terms of the contract; but the correspondence shows that the time for delivery had been extended by mutual consent. The whole of the first parcel having been delivered, the defendant was entitled to payment for that parcel in fourteen days. Payment was demanded and refused. The defendant had then a right, according to the principle laid down in Hoare *v.* Rennie, to treat that refusal as a breach, and to rescind the contract. In that case the plaintiffs had undertaken to deliver to the defendants 667 tons of iron, to be shipped from Sweden in the months of June, July, August, and September, and in about equal portions each month. In June the plaintiffs delivered twenty-one tons only; whereupon the defendants gave them notice that they would receive no more; and the Court of Exchequer held that they were justified in considering the contract as at an end. Pollock, C. B., in delivering judgment, said: "At the outset, the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for." So, here, the non-performance by the plaintiffs of the stipulation as to payment for the first parcel entitled the defendant to assume that they repudiated the contract. In Withers *v.* Reynolds the refusal by the buyer to perform his part of the contract by paying for each load of straw as delivered, was held to entitle the seller to rescind the contract.

[DENMAN, J. There the plaintiff did acts and said things which amounted to a declaration on his part that he did not mean to perform the contract.]

Hoare *v.* Rennie was distinctly recognized in Bradford *v.* Williams, though somewhat reflected upon in Simpson *v.* Crippin.

[DENMAN, J., referred to Jonassohn *v.* Young.]

LORD COLERIDGE, C. J. The question in this case arises upon a contract for the sale of iron entered into between the plaintiffs and the defendant on the 28th of November, 1871, in the following terms: "Bought of Messrs. D. M. Burr & Co. 250 tons of pig-iron, at 56*s.* per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash fourteen days after delivery of each parcel." The material facts were these: There was no delivery in the terms of the contract of either parcel of the iron. In point of fact, the delivery of the first 125 tons was by mutual arrangement delayed, and the last delivery of that parcel did not take place until the 12th of May, 1872. There was a correspondence between the parties, pressure by the purchasers for delivery, and

excuses by the vendor for the non-delivery. That the former were anxious for the completion of the contract appears to be clear, as well from the tenor of the correspondence as from the fact that the market was rising. A few days after the full delivery of the first parcel, viz., on the 29th of May, 1872, the defendant demanded payment for the 125 tons, which the plaintiffs refused, claiming to set off damages for the defendant's breach of contract. The plaintiffs afterwards demanded delivery of the remaining 125 tons; and upon the defendant's refusal to comply with that demand this action was brought. The question is whether the fact of the plaintiffs' refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it. This certainly appears, viz., that there was an extension by mutual consent of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. That is the true principle on which Hoare *v.* Rennie was decided, whether rightly or not upon the facts, I will not presume to say. Where, by the non-delivery of part of the thing contracted for, the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in Jonasshon *v.* Young that that case may be supported. In Withers *v.* Reynolds there was an express refusal by the plaintiff to perform the contract, and Patteson, J., says: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract." Wightman, J., certainly, and Crompton, J., by inference, in Jonassohn *v.* Young, both uphold that case upon the principle on which I rely. The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of

the contract or a refusal to perform it on the part of the person so making default. That being so, and my brother Brett having ruled that the mere non-payment for the first portion of the iron contracted for, unattached by any other act on the part of the purchasers, did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself), I am of opinion that his ruling was correct, and that the rule should be discharged.

KEATING, J. I entirely agree in the judgment pronounced by my lord, and in the principle upon which he puts it. It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element. But, looking at all the circumstances of this case, — a rising market; a failure on the part of the defendant to deliver the iron according to the terms of the contract; a series of deliveries in small quantities long after the times for delivery provided for by the contract; and a refusal on the part of the plaintiffs to pay for the iron delivered, not only accompanied by remonstrances, but with a requisition to the seller to fix a day for the delivery of a certain quantity; I do not think they show an intention on the part of the plaintiffs to abandon the contract. As upon the facts there appears to have been not only no absolute refusal to perform the contract by the plaintiffs, but, what is important, no evidence of inability on their part to perform it, I think the defendant had no right to treat the contract as rescinded and to refuse to deliver the remainder of the iron.

DENMAN, J. I am of the same opinion. The learned judge ruled that the mere refusal by the plaintiffs to pay for the portion of the iron delivered did not warrant the defendant in considering the contract as at an end; and he gave the defendant leave to move to enter a verdict or a nonsuit if the Court should think that ruling wrong. I am of opinion, upon the authority of Withers *v.* Reynolds, that the ruling was quite right. That case did not decide expressly that a mere failure of a single payment might not be evidence of a refusal to perform the contract. But, in the words of Patteson, J., the conduct of the plaintiff, coupled with the non-payment, amounted to an express refusal to perform the contract on his part. There was nothing of the sort here. After the way in which that case has been treated in subsequent authorities, I think we are bound to hold it to be a correct statement of the law, and to act upon it. Notwithstanding the plaintiffs' refusal to pay, the defendant was bound to go on and deliver the rest of the iron. *Rule discharged.*

THE MERSEY STEEL AND IRON CO. (LIMITED), APPELLANT, *v.* NAYLOR, BENZON, & CO., RESPONDENTS

IN THE HOUSE OF LORDS, March 28, 1884

[*Reported in* 9 *Appeal Cases,* 434]

APPEAL from an order (dated June 13, 1882) of the Court of Appeal (Jessel, M. R., Lindley and Bowen, L. JJ.) reversing an order of Lord Coleridge, C. J. The facts are fully set out in the report of the decisions below. The facts material to the present report may be stated as follows: The respondents bought from the appellant company 5000 tons of steel of the company's make to be delivered 1000 tons monthly commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2d of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents, *bonâ fide,* under the erroneous advice of their solicitor that they could not without leave of the court safely pay pending the petition, objected to make the payment then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of setoff. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counterclaimed for damages for breaches of contract for non-delivery. The referee having found that the damages due to the defendants for non-delivery amounted to £1723, being in excess of the £1713 admitted to be due to the plaintiffs for the price of the steel delivered, the Court of Appeal, by an order dated the 13th of April, 1883, gave judgment for the defendants with costs. The plaintiffs appealed from this order also.

LORD BLACKBURN. I have no doubt that Withers *v.* Reynolds, 2 B. & Ad. 882, correctly laid down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine" (in Withers *v.*

Reynolds, 2 B. & Ad. 882, it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." That was settled in Hochster *v.* De la Tour, 2 E. & B. 678, in the Queen's Bench, and has never been doubted since; because there is a legal breach of the contract although the time indicated in the contract has not arrived.

That is the law as laid down in Withers *v.* Reynolds, 2 B. & Ad. 882. That is, I will not say the only ground of defence, but a sufficient ground of defence. In Freeth *v.* Burr, Law Rep. 9 C. P. 208, it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is to me clear that that is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a *bonâ fide* statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of Withers *v.* Reynolds, 2 B. & Ad. 882, and Freeth *v.* Burr, Law Rep. 9 C. P. 208, and consequently, as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to Pordage *v.* Cole, 1 Wms. Saund. 548, ed. 1871), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to con-

tend that after a little while, but he said that whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agreed that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract. With regard to the case of Hoare *v.* Rennie, 5 H. & N. 19, it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole and no less is the essence of it. And again in Honck *v.* Muller, 7 Q. B. D. 92, which has been referred to, it is expressly and pointedly shown that that was the ground taken, and the noble and learned Lord opposite (Lord Bramwell) stated that in his opinion the contract of the one party was to deliver and of the other to take 2000 tons of iron, and that inasmuch as it was to be by three instalments and the first was gone and there never could be more than two thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two thirds when the plaintiff required the two thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. The present Master of the Rolls seems, if I understand him rightly, to have thought that that was not the true construction of the contract; whether it was or not I do not express any opinion, except to point out that whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract; and that being so, these cases have really no bearing upon the matter.

The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be

a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.[1]

VULCAN TRADING CORPORATION, Plaintiff in Error, *v.* KOKOMO STEEL & WIRE COMPANY, Defendant in Error

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1920

[*Reported in* 268 *Federal Reporter,* 913]

Before Baker, Evans and Page, *Circuit Judges.*

Baker, *Circuit Judge,* delivered the opinion of the court:

Vulcan Corporation, as buyer, and Kokomo Company, as seller, entered into a contract whereby the seller sold 4,500 tons of wire rods to the buyer at $58 a ton and agreed to deliver on cars at Kokomo, Indiana, 1,500 tons in November, 1,500 tons in December, and 1,500 tons in January; and the buyer agreed to establish in the seller's name an irrevocable banker's credit, subject to sight drafts with bills of lading attached, the credit for the November shipments to be established on the preceding October 15th, for the December

[1] Lords Selborne, Watson and Bramwell delivered concurring opinions. Lord Fitzgerald also concurred.

In Helgar Corporation *v.* Warner's Features, Incorporated, 222 N. Y. 449, Cardozo, J., thus stated for the court the rights of the parties under an installment contract to buy and sell goods in a jurisdiction where the Uniform Sales Act has been enacted.

"The rights of vendor and vendee upon the breach of an installment contract are now regulated by statute. The rule is to be found in section 126, subdivision 2, of the statute governing sales of goods (Personal Prop. Law, Consol. Laws, ch. 41; amd. L. 1911, ch. 571); 'Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.'

"The statute thus establishes a like test for vendor and for vendee. The earlier cases may not be wholly uniform (Wharton & Co. *v.* Winch, 140 N. Y. 287; Kokomo Strawboard Co. *v.* Inman, 134 N. Y. 92; Wolfert *v.* Caledonia S. I. Co., 195 N. Y. 118). We do not need to reconcile them. We have departed from the rule of the English statute (56 & 57 Vict. ch. 71, § 31, subd. 2), which keeps the contract alive unless the breach is equivalent to repudiation. (Note of Commissioners on Uniform Laws, American Uniform Commercial Acts, p. 98; Williston on Sales, pp. 809, 810; 25 Halsbury, Laws of England, p. 220). We have established a new test, which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong. 'It depends in each case on the terms of the contract and the circumstances of the case' whether the breach is 'so material' as to affect the contract as a whole.

"The answer to that question must vary with the facts (Williston on Sales, p. 810). Default in respect of one installment, though falling short of repudiation, may under some conditions be so material that there should be an end to the obligation to keep the contract alive. Under other conditions, the default may be nothing but a technical omission to observe the letter of a promise (Williston on Sales, p. 823; Nat. Machine & Tool Co. *v.* Standard S. M. Co., 181 Mass. 275, 279; Wharton & Co. *v.* Winch, *supra*). General statements abound that, at law, time is always of the

shipments on November 15th, and for the January shipments on December 15th.

In its complaint the buyer set forth the contract and averred that it had established the required credit of $87,000 on October 15th and a like credit on November 15th; that the December credit was not established until December 23rd; that the delay of eight days was occasioned by the following circumstances, namely, that the seller was a manufacturer in Indiana; that the buyer was a jobber in New York; that when making the contract the seller knew that the buyer was purchasing the wire rods for the purpose of reselling them to the trade; that prior to December 15th the seller knew that the buyer had resold the 4,500 tons deliverable by the seller under the contract; that with such knowledge the seller delivered down to December 15th only 400 tons; that, if the seller had delivered prior to that date the tonnage then due, the buyer could have used the bills of lading as bases for credit and would have established the December credit on the 15th; that, because it did not have such bills of lading, the buyer was required to spend the eight days in procuring other means of credit; that on January 1st the seller was in default for 2,600 tons of the promised November and December shipments; that during January the seller continued to make deliveries until the 2,600 tons for November and December had been delivered, and then refused to make any part of the 1,500 tons deliveries for January, although the sum of $87,000 to pay therefor was then, and had been since December 23rd, standing to the credit of the seller; and that thereby the buyer was damaged, etc. To this complaint the seller's general demurrer was sustained and judgment for costs followed the buyer's refusal to plead further.

Throughout the briefs and arguments for the seller runs the basic contention that the buyer's delay in establishing the December 15th credit for January shipments breached a condition precedent and

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essence (Williston, *supra;* Norrington *v.* Wright, 115 U. S. 188; Booth *v.* S. D. Rolling Mills Co., 60 N. Y. 553; Schmidt *v.* Reed, 132 N. Y. 108). For some purposes this is still true. The vendor who fails to receive payment of an installment the very day that it is due, may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the contract at an end (Williston, p. 823; Beatty *v.* Howe Lumber Co., 77 Minn. 272, and cases there cited; Graves *v.* White, 87 N. Y. 463, 466). That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties. Whatever the rule may once have been, this is the test that is now prescribed by statute. The failure to make punctual payment may be material or trivial according to the circumstances. We must know the cause of the default, the length of the delay, the needs of the vendor, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is willful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperilled, in these and in other circumstances, there may be another conclusion. Sometimes the conclusion will follow from all the circumstances as an inference of law to be drawn by the judge; sometimes, as an inference of fact to be drawn by the jury."

thereby absolved the seller from ever making the shipments promised for January. If the contract had been for only the November deliveries and the October 15th credit, we will assume that on the buyer's failure to establish the credit on October 15th the seller could have successfully denied obligation to deliver. And if there had been successive separate contracts similarly covering December and January deliveries, the consequences of failure or delay in establishing prior credits would have been the same. So the seller is found to be contending for the very same right that would have accrued to it if there had been a separate contract for January deliveries. But three separate contracts were not executed. There is but one contract. It is an entirety, even though it calls for instalments of deliveries and instalments of credit. A contract for a single delivery and a single credit and a contract for instalments of deliveries and instalments of credit are alike in this respect: Performance of the buyer's promise to establish a prior credit stands as a condition precedent to the seller's obligation to deliver; it is a condition precedent because it is the first promise to be fulfilled in order to set in motion the execution of the contract; the seller's promise is a secondary, subordinate, dependent condition; but if the buyer has fulfilled his promise, that promise has been converted into a completed act and no longer stands as any part of the executory contract, and the seller's promise thereupon acquires the primary rank in the executory contract. A single contract and an instalment contract differ in this respect: In the single contract, if the buyer by fulfilling his promise to establish the single credit has promoted the seller's promise of a single delivery into the primary rank in the executory contract, there are no remaining promises on the part of the buyer to become secondary, subordinate, dependent conditions; while in the instalment contract, if the buyer by fulfilling his promise respecting the first instalment of credit has promoted the seller's promise of the first instalment of deliveries into the primary rank in the executory contract, there remain the alternately succeeding promises of credits and deliveries. After the buyer has stricken from the executory parts of the instalment contract his first promise by converting it into a completed act, may the seller ignore his own default in completing on time the first instalment of deliveries — an obligation which now stands first among the executory parts of the contract — and insist that the buyer's promise of the succeeding instalment of credit stands first and that performance thereof on the named day becomes a condition precedent to the seller's obligation to continue the performance of the contract beyond completing the first promised delivery? Is this buyer's delay of eight days in establishing the December 15th credit, while the seller was executing the contract without regard to its own promises of time, fatal to the maintenance of this action? Yes, if the establishment of the December 15th credit on that exact date was a con-

dition precedent. Yes or no, dependent upon the materiality of the delay, if the condition was not a condition precedent but merely a condition which had to be fulfilled reasonably in the circumstances in which the parties were mutually executing the contract. But in order to hold that the condition is a condition precedent it would be necessary to say that an instalment contract is the same in law as separate and independent contracts which in times and amounts of credits and deliveries would correspond with the instalments of the instalment contract. Such is not the law. An instalment contract is an entirety. The present contract was for one sale of 4,500 tons, not three contracts for three sales of 1,500 tons each. Norrington *v.* Wright, 115 U. S. 188; Simpson *v.* Crippen, L. R. 8 Q. B. 14; Freeth *v.* Burr, L. R. 9 C. P. 208; Mersey Steel & Iron Co. *v.* Naylor, 9 Ap. Cas. 434; Cherry Valley Iron Works *v.* Florence Iron River Co., 64 Fed. 569; Cycle Co. *v.* Wheel Co., 105 Fed. 324; Construction Co. *v.* Guerini Stone Co. 241 Fed. 545; Williston on Sales, 5th 1. from bottom of p. 821 to 6th 1. of p. 824; 13 Corpus Juris 568–9.

So the inquiry becomes: Was the buyer's delay in establishing the December 15th credit until December 23rd a material breach of a subordinate condition of the contract in the circumstances pleaded in the complaint? While in instalment contracts stipulations of times of delivery are ordinarily material obligations, breaches of which go to the essence of the contract, stipulations of times of payment, in the absence of an express or necessarily implied condition that times of payment shall be of the essence, are not so vital that delay in payment would justify the seller's refusal to deliver the succeeding instalments, unless the delay caused material injury to the seller or fairly expressed the buyer's intention no longer to be bound by his remaining executory agreements. (Authorities, *supra.*) Without an agreement to the contrary, delay in payment may ordinarily be compensated for with interest; but without an agreement to the contrary, delay of delivery of goods beyond the stipulated times violates the foundational purpose of the buyer in entering into the contract at all. And if a buyer's delay in paying for goods already delivered would not necessarily absolve the seller from his remaining executory agreements to deliver, how much less material was this buyer's delay in establishing the December credit against the promised January shipments! On October 15th the seller company had available $87,000 of the buyer's money with which to pay itself for the November shipments! On November 15th, though the seller had not shipped a pound, the buyer was required to and did put up $87,000 more, because the seller could not be known to be in default for the November shipments until the last day of the month. On December 15th, the seller having shipped only 400 tons and having paid itself $23,200 therefor, there remained in bank subject to the seller's drafts $150,800 of the buyer's money. On

December 23rd this was increased to $237,800, and the amount so remained with the oncoming of January. During January the seller completed the shipments due in November and December; and when the seller refused to do anything about the January shipments, $87,000 of the buyer's money was still in bank for the seller's benefit. Now the plain purpose of requiring the buyer to establish credits in advance of deliveries was to give the seller unquestionable security, not security that subsequently might have to be pursued, but security yielding cash on delivery. The delay of eight days was not a material, if any, impairment of that purpose, because for eight days preceding January and for a month and eight days preceding the seller's completion of the November and December shipments the credits for the entire 4,500 tons were available to the seller. And between December 15th and December 23rd the pleaded circumstances of the seller's knowledge of the buyer's purpose in entering into the contract, the seller's knowledge prior to December 15th of the buyer's resales of the 4,500 tons, and the rapidly rising market, so far from fairly expressing the buyer's intention no longer to be bound, unmistakably demonstrate the buyer's desire that the contract should be fulfilled.

Though the foregoing considerations suffice, in our judgment, to determine this writ of error, two other propositions, based on the premise that the condition respecting the December 15th credit was a condition precedent, have been extensively argued and it may not be inappropriate briefly to notice them.

One is that, though a defendant's act of prevention will excuse the plaintiff's nonperformance of a condition precedent, nothing short of an act which makes it "physically impossible" for the plaintiff to perform is a "legal prevention." Duress, undue influence, and other like oppressions, are not restricted to physical means. Why should "legal prevention" be so limited? In Lake Shore Ry. Co. *v.* Richards, 152 Ill. 59, the court, after reviewing numerous cases, denied such a limitation. See also, United States *v.* Peck, 102 U. S. 64; Griffin *v.* American Gold Mining Co., 123 Fed. 283; Heidenheimer *v.* Cleveland, 32 S. W. 826 (Texas).

The other is that, conceding the inability of the party who is first in default to count as plaintiff upon the defendant's following default (State *v.* McCauley & Tevis, 15 Cal. 430; Central Lumber Co. *v.* Arkansas Valley Co., 86 Kan. 131), if the party who is first in default is defendant, he may base a successful resistance upon the plaintiff's following default. But in Ankeny *v.* Richardson, 187 Fed. 550, the party who was first in default was defendant and he was not permitted to speak of the plaintiff's act in following his example.

But to neither of these two questions do we now find it necessary to formulate a definitive answer of our own.

The judgment is reversed with direction to overrule the demurrer to the complaint.

GEORGE CAHEN, RESPONDENT, *v.* JOHN R. PLATT ET AL., APPELLANTS

NEW YORK COURT OF APPEALS, April 9–17, 1877

[*Reported in* 69 *New York,* 348]

APPEAL from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 8 J. & S. 483.)

This action was brought to recover damages for the alleged breach of a contract of purchase and sale.

The facts appear sufficiently in the opinion.

Wm. P. Chambers, for the appellants.

Jno. E. Parsons, for the respondent.

EARL, J. In September, 1872, at the city of New York, the plaintiff sold to the defendants 10,000 boxes of glass, at seven and one-half per cent discount from the tariff price of July, 1872, to be paid for in gold, at New York upon delivery of invoice and bill of lading, by bills of exchange on Antwerp. The glass was to be of approved standard qualities, and was to be shipped on board of sailing vessels at Antwerp, and to be at the risk of the defendants as soon as shipped, and they were to insure and pay the freight and custom duties. The glass was to be delivered during the months of October, November, and December, 1872, and January, 1873. In pursuance of this contract, the plaintiff delivered to the defendants 4,924 boxes of glass, for which they paid. They refused to receive any more, and this action was brought to recover damages consequent upon such refusal.

The defendants claimed, and gave evidence tending to prove, that the glass delivered was not of approved standard quality, and hence that they had the right to refuse to take the balance.

While some months after the glass was delivered the defendants complained of its quality, they at no time offered to return it, or gave plaintiff notice to retake it. They received it under the contract, and it is not important in this action to determine, as no counterclaim is set up, whether or not a right of action for damages on account of the inferior quality of the glass survived the acceptance. The fact that the glass delivered and received upon the contract was inferior did not give them the right to repudiate the contract altogether. They could demand better glass, and when the plaintiff offered to deliver the balance, if it was inferior, they could refuse to accept it. But if plaintiff was ready and willing to deliver for the balance such glass as the contract called for, they were bound to receive it. Here the plaintiff requested them to take the balance of the glass, and they refused to take any more, and thus repudiated and put an end to the contract. There was no proof that the plaintiff insisted upon delivering inferior glass, or that he was not ready

and willing to deliver glass of the proper quality. They did not take the position that they were willing to receive glass of approved standard quality, but refused to take any more glass under the contract. There was, therefore, such a breach of contract as entitled the plaintiff to recover such legal damages as he sustained by the breach.

All concur. *Judgment reversed.*[1]

PLINY CADWELL AND ANOTHER *v.* EZEKIEL BLAKE AND ANOTHER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1856

[*Reported in* 6 *Gray,* 402]

ACTION OF CONTRACT, commenced on the 5th of April, 1854, by the assignees in insolvency of David Ames and John Ames, upon an agreement in writing made by the latter with the defendants on the 26th of January, 1853.

The following are the material parts of that agreement: "The said D. & J. Ames hereby sell to the said Blake & Valentine all the right, title, and interest which the said D. & J. Ames have in the machinery and fixtures now at their paper-mill at Chicopee Falls. They also agree that said Blake & Valentine shall have the right which said D. & J. Ames have to manufacture white paper, made from straw and other materials; which right has been assigned to said D. & J. Ames by Jean Theodore Coupier and Marie Amadee Charles Millier, and as described in the application of said D. & J. Ames for letters-patent of the United States. They also agree to instruct the said Blake & Valentine fully in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and to communicate to them from time to time all the improvements which they, the said D. & J. Ames, shall make in said art, and give them the benefit thereof; which instructions the said Blake & Valentine are to keep secret, so far as secrecy can be preserved consistently with their business."

"The said Blake & Valentine are to pay for said machinery and fixtures four thousand dollars, in four equal annual payments, with annual interest from date. Payment is to be made in paper, manufactured according to the process above mentioned, at the market price of such paper at the time when each payment shall become due, the paper to be delivered at the Western Railroad freight depot in Springfield. They also agree to take possession of said machinery and fixtures by the fourth of July next, and proceed as soon as may

[1] A portion of the opinion relating to the measure of damages, is omitted. Numerous decisions on the effect of a breach by one party to an instalment contract on the obligations of the other are collected in 2 Williston Contracts, §§ 864–870.

be with manufacture; and to pay to said D. & J. Ames for the right to manufacture said white paper" a certain share of the profits, if the profits exceed two cents a pound; otherwise nothing.

"If any dispute or disagreement shall arise between the parties in regard to the estimate of the profits, it shall be referred to three disinterested men, one to be chosen by each party, and the third by the two referees, and the award shall be binding on the parties."

"If the said D. & J. Ames shall, upon request, refuse to teach the said Blake & Valentine the art of making said paper as above mentioned, they shall forfeit, as liquidated damages, distinct from all the other liabilities under the contract, the sum of four thousand dollars."

The declaration set forth the agreement, and averred that David Ames and John Ames delivered said machinery and fixtures to the defendants according to the terms thereof, and the defendants accepted and received the same; that the defendants owed the plaintiffs therefor the sum of one thousand dollars with interest, and also the interest due on four thousand dollars, as therein stipulated; and that the plaintiffs had been ready to receive the paper therein specified, yet the defendants had not delivered the same, but had refused so to do.

Answer, 1st. That the defendants entered into said agreement upon the consideration and for the purpose of securing the right to manufacture white paper from straw by the process therein named, and of obtaining the necessary instructions in said art and mystery; that D. & J. Ames and the plaintiffs had failed to fulfil their contract in this behalf, and had neglected and refused to secure to the defendants the right to manufacture according to said process, and to instruct them in the art and mystery thereof, although repeatedly requested by the defendants so to do, and had prevented the defendants from using said process. 2d. That there had been a failure of consideration for the contract on their part; that said machinery and fixtures were of no value to them without said instructions and said right to manufacture; and they had offered to return them. 3d That D. & J. Ames were not the proprietors of said right to manufacture, and had not at the time, nor obtained since, any effectual assignment thereof, or any right to contract with the defendants therefor; or else had failed to avail themselves of such assignment, and had abandoned, lost, and suffered themselves to be deprived of the right to use said process, and of the patent issued therefor; whereby their agreement to give the defendants such right had been defeated, and the defendants prevented from using said process and from manufacturing said paper. 4th. That the defendants, by such failure to secure to them said right and to give them such instructions, had been prevented from fulfilling the agreement on their part. 5th. That D. & J. Ames were requested to teach the defendants the art and mystery of making said paper according to said process, but

neglected and refused so to do, and thereby incurred a forfeiture under said agreement of the sum of four thousand dollars as liquidated damages; which the defendants claimed the right to apply to offset and cancel all claims of the plaintiffs under the agreement.

At the trial in this court the defendants admitted the execution of the agreement, and the delivery to them of possession of the paper-mill, machinery, and fixtures about the 1st of March, 1853. The plaintiffs then rested their case.

The defendants contended that the plaintiffs were not entitled to recover, without proving "1st. That D. & J. Ames had such an assignment of the right as their contract states: 2d. That they had availed themselves of it, and made it effectual to secure to themselves the patent, or at least a right to manufacture under it for themselves and the defendants; 3. That they had conveyed or secured to the defendants the right to use the process; 4th. That they had instructed the defendants in the art of making said paper."

The plaintiffs denied that it was necessary for them to offer any further evidence, or that any of the matters alleged in the answer constituted a good defence to the action.

Bigelow, J., ruled that the plaintiffs had made out a *prima facie* case, and would be entitled to a verdict unless the defendants went forward and offered evidence of the matters set out in their answers; and reported the case for the determination of the full Court upon these two questions: 1st. The correctness of his ruling as to the sufficiency of the case as presented by the plaintiffs; 2d. The sufficiency of the grounds of defence set forth in the answer; a new trial to be had if upon either of these points, the opinion of the Court should be in favor of the defendants.

The arguments and decision upon this report were had at the last September term.

W. G. Bates and *J. Wells,* for the defendants.

F. Chamberlin, for the plaintiffs, cited Boone *v.* Eyre, 2 H. Bl. 273, note; Stavers *v.* Curling, 3 Bing. N. C. 355; Campbell *v.* Jones, 6 T. R. 572; Lloyd *v.* Jewell, 1 Greenl. 356; Knapp *v.* Lee, 3 Pick. 452; Platt on Cov. 90, 106; Knight *v.* New England Worsted Co., 2 Cush 271; Townsend *v.* Wells, 3 Day, 327; Couch *v.* Ingersoll, 2 Pick. 300; Pordage *v.* Cole, 1 Saund. 320, and note 4; Franklin *v.* Miller, 4 Ad. & El. 599.

Shaw, C. J. No question arises in the present case as to the pleading; the declaration is perhaps sufficient, under the new practice act, to enable the plaintiffs to recover, inasmuch as it does briefly aver the performance on the part of D. & J. Ames, and the plaintiffs, their assignees in insolvency, of all things on their part by the terms of the contract to be performed. But it is a question of proof: did the plaintiffs offer sufficient proof of performance on their part to enable them to recover? This again depends on the construction of the contract, and whether, according to its true interpretation, the

stipulation for the payment of $4,000 and interest, in paper to be manufactured by the process contemplated by the contract, was independent, and to be performed absolutely by such payment; or was it dependent and conditional, and to be performed only on condition that certain other things should be first performed on the part of the said D. & J. Ames?

The contract consists of several articles on both sides, is expressed in terms somewhat brief, and it is not easy to gather from it the full and clear intent of the parties. The great purpose of the contract seems to have been for D. & J. Ames to transfer to the defendants a right, a useful and beneficial right, to manufacture and sell white paper in so cheap a manner and in such quantities as to yield a profit, which right D. & J. Ames had acquired so far as it could be acquired by assignment before patent, and of which they were expecting to become the patentees by a patent to be regularly issued by the competent authority of the United States. The particular right is not otherwise specifically described and identified than as a right which had been assigned to them by Coupier & Millier, and as described in the application of D. & J. Ames for letters-patent. It manifestly looked to the expectation that D. & J. Ames were to be the patentees, because they were the assignees and had applied for a patent, and because they stipulated to extend to the defendants all the benefit of the improvements which they should make.

In construing a mutual agreement, in which there are several stipulations on both sides, the question, whether one is absolute and independent, or conditional and made to depend on something first to be done on the other side, does not depend on any particular form of words, or upon any collocation of the different stipulations; but the whole instrument is to be taken together, and a careful consideration had of the various things to be done, to decide correctly the order in which they are to be done.

It is contended that, as the machinery and fixtures were to become the property of the defendants at once, at a fixed price of $4,000, payable at a certain time, they were to pay for them at all events, whether the manufacture of paper by the new process should go on or not. There would be more force in this argument if it appeared that the fixtures and machinery thus sold were adapted to the general purposes of paper-making, and had a market value, independently of the new process, and especially if the time for making the payment had been fixed at a time before the acts to be done on the other side.

But in this case, for aught that appears, the machinery and fixtures would be of little value except for manufacturing by the new process. And possibly the defendants may have stipulated to pay a sum greater than their value for these articles, in consideraiton of the advantages expected from the whole contract.

The stipulation, that the price of the machinery and fixtures should

be paid at a fixed time, affords no criterion for determining that the stipulation is independent; because there was ample time before the first payment for D. & J. Ames to transfer the machinery, afford all the necessary instruction, execute and deliver a license conveying to the purchasers a right to manufacture, and do all other acts relied on as conditions precedent.

But the strong ground on which the Court are of opinion that these acts of D. & J. Ames were conditions precedent is, that these payments were to be made by a delivery of paper, to be manufactured by this new process from straw and other materials, at the then market value. This process is recognized and represented in the contract itself as an art and mystery, to be kept secret as far as practicable, not yet patented, and of which, therefore, there was no specification in the patent-office, from which the process could be learned. The machinery sold may have been that of the inventors, adapted to the making of paper by this process.

It seems to us that these two stipulations, to deliver the machinery and to give the instruction, stand upon the same footing, because both were necessary to the making of paper by this process. The stipulation to instruct in the art and mystery was absolute and affirmative, like that to deliver the machinery, not dependent on request. There was a distinct stipulation, that if they should refuse to instruct on request, they should be liable to liquidated damages; but it has a distinct object, and does not supersede the other.

Without instruction in this art and mystery, the defendants might not know the method of preparing the straw and using the machinery; without these, this kind of paper could not be made, it could have no market-price, the defendants could not make it, and of course could not deliver it.

When in the order of events the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment, sufficiently distant to have the work done in the mean time. Suppose B. agrees to build at his own shop a carriage for A., of A's materials; A. stipulates seasonably to furnish materials, and to pay B. in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A. is a condition precedent. Without it B. cannot perform. He must build it of A's materials. Even building it of his own would not be a performance. B. has his shop, his tools, and his workmen all ready, but A. does not furnish the materials. If B. sues A., averring readiness to perform, he may recover. But if A. sues B. for not building the carriage, it would be a good answer that A. himself had not furnished the materials; because, whatever else the contract may contain, this is in its nature a condition precedent.

The Court are therefore of opinion that the plaintiffs, as a part of their own case, should not only have averred, but should have offered proof at the trial, that D. & J. Ames gave full and ample and reasonable instruction to the defendants, or — which is of the same legal effect in matters of contract for doing specific acts — that they tendered and offered such instruction in regard to the preparation of the material and the use of the machinery, to enable them to make the paper in the manner and of the material proposed, which the defendants declined receiving.

The Court are also inclined to the opinion that the legal effect of the stipulation of D. & J. Ames with the defendants was, that they should have a full right to manufacture paper by the process therein indicated, whatever the nature of the right then was or might become by the obtaining of a patent, which it appears by the contract they expected to obtain, or in failure of such patent, such right as they should hold from the assignment to them by Coupier & Millier. They were embarking in a new and expensive enterprise; and should another person obtain a patent, which might happen, they might be placed in a situation in which they could not carry on the manufacture without infringing the right of another. If the patent was obtained by D. & J. Ames, it seems to us that they should have tendered to the defendants an assignment of the patent, or at least a right under it; or that, if the application was still pending, or had been denied, and there was no patent, that fact should have been averred. But we have not placed our decision ordering a new trial mainly on that ground; but throw out the suggestion for the consideration of parties, should a new trial be had.

But there is another ground upon which the court are of opinion that a new trial ought to be had. Perhaps both points reserved in the report depend substantially upon the same question of construction of this contract, namely, whether any of the stipulations of D. & J. Ames constituted conditions precedent; because, if they did, and so far as they did, and the defendants have averred the performance of them, they would, if proved by the defendants, as they offered to do, be a good defence. Upon looking at the answer, we think that, even if the plaintiffs had made out a *primâ facie* case, several of the facts stated in the answer would have been competent for the defendants to prove; and, if proved, would have been available in defence, either by way of bar, or in reduction of damages.

New trial ordered.

The plaintiffs then amended their declaration by inserting an averment "that the said D. & J. Ames instructed the defendants in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and offered them further instructions if they should need it, and full examination of the premises of the said D. & J. Ames, and permission to take dimensions, and to be shown the use and application of whatever they might

desire to inquire about, and to give them all needful information which they should require."

The defendants demurred to the declaration, for that it did not state a legal cause of action, substantially in accordance with the rules contained in the Statute of 1852, c. 312; "because it does not allege that the plaintiffs, or said D. & J. Ames, had secured to the defendants the right to manufacture paper by the process named in said contract, nor that the defendants have the right to manufacture according to the terms of the contract."

Bates and *Wells,* for the defendants.

R. A. Chapman and *Chamberlin,* for the plaintiffs.

Shaw, C. J. The Court are of opinion that this demurrer is well taken and must be sustained. It is true there is no warranty in terms of a right to manufacture paper by the process referred to; but we think such a warranty and condition results from the provisions of the contract, the whole of which must be taken together. D. & J. Ames agree that the defendants shall have the right to manufacture white paper from straw and other materials, which right has been assigned to D. & J. Ames by Coupier and Miller. It is not merely hypothetical, such right as they have, if they have any; but an express stipulation that they shall have the right, and an affirmative averment of the fact that it has been assigned to them, so that they have the power to assure it, with an intimation that the assignment is of such a character as to induce them to apply for a patent, which, if granted, would secure to them an exclusive right. If they had such an assignment, whether they obtained a patent or not, it would prevent any other person from obtaining a patent so as to exclude them from the right. Such a stipulation, accompanied with such an express undertaking that they held such an assignment, amounted to a stipulation that no other person should have such right as to exclude them therefrom; and that, either by a grant of the patent-right from D. & J. Ames if they obtained one, or by common right if none should be obtained, the defendants should have the right to manufacture by this new and peculiar process. When we consider that the whole object of the contract was to enable the defendants to manufacture by this process; that the consideration of the undertakings of the defendants was their right and power so to manufacture paper; that the debt was to be paid in paper thus to be manufactured; that without such right the machinery and fixtures might be of little value to them, and the teaching of an art they could not practise, without infringing the rights of others, wholly useless, the conclusion seems inevitable, that the enjoyment of a right to use this art and process, patented or unpatented, was regarded by the parties as a condition, without a performance of which on the part of D. & J. Ames, or those who claim under them, the defendants are not bound to make the stipulated payments.

Demurrer sustained.

VYSE *v.* WAKEFIELD

IN THE EXCHEQUER, EASTER TERM, 1840

[*Reported in* 6 *Meeson & Welsby,* 442]

COVENANT on an indenture, dated the 3d of March, 1827, whereby the defendant, in consideration of 3,100*l.*, bargained, sold, and assigned to the plaintiff certain dividends, interest, and annual produce, from time to time due and payable or to arise from and after the decease of one Eliza Robson, during the natural life of the defendant, if he should survive her; to have, hold, receive, and take the dividends, &c., thereby assigned unto the plaintiff, his executors, &c., from and after the decease of the said Eliza Robson, for and during the natural life of the defendant, if he should survive her; and the defendant did thereby for himself, his heirs, &c., covenant, promise, and agree with and to the plaintiff, his executors, administrators, and assigns, amongst other things, that he the defendant should and would at any time or times thereafter, at the request of the plaintiff, his executors, administrators, or assigns, appear at an office or offices for the insurance of lives within London, or the bills of mortality, or before the agent or agents of any such office or offices in the county where he the defendant might happen to be resident or actually to be; and then and there truly answer such questions as should or might be asked or required touching or concerning his age and state of health, and do all other necessary acts in order to enable the plaintiff, his executors, administrators, or assigns, if he or they should think proper, to insure the life of him the defendant; and he should not afterwards do, or, as far as with him should lie, permit to be done, any act, deed, or thing whatsoever, whereby any such insurance might be avoided or prejudiced; as by the said indenture, reference being thereunto had, will, amongst other things, appear. And the plaintiff says, that he the defendant, in part performance of his said covenant, did afterwards, to wit, on the 8th day of March, 1827, at the request of the plaintiff, appear at an office for the insurance of lives within London, that is to say, the office of a certain company of persons, or office established for the purpose and carrying on the trade or business of and for the insurance of lives, under the name of, and called and known by the name of, the Rock Life Assurance Company, and did then and there answer certain questions then asked and required of him touching and concerning his age and state of health, and did then do all other necessary acts in order to enable the plaintiff to insure the life of him the defendant in and with the said company or office, he the plaintiff then thinking proper and intending to insure the life of him the defendant in and with the said company or office, according to the course and practice of the said company or office; the an-

swering such questions as aforesaid, and the said other matters in that behalf aforesaid, being necessary and proper, according to the course and practice of the said company or office, to enable the plaintiff to insure the life of the defendant thereupon and therewith, and being reasonable in that behalf, of all which the defendant then had notice. And the plaintiff further says, that he the plaintiff did thereupon, and within a reasonable time then next following, to wit, on the day and year last aforesaid, according to the course and practice of the said company or office, insure the life of the defendant in and with the said company or office, by a certain policy or insurance, at and for the premium of 81*l.* 17*s* 6*d.*, payable annually in that behalf, in order to and whereby the plaintiff then became and was entitled, if such premiums should be so paid, to be paid and satisfied out of the funds and property of the said company, according to the provisions of the company's deed of settlement, within three calendar months after satisfactory proof should have been received at the office of the said company of the death of the defendant, the sum of 3,000*l.*, and such further sum or sums as might, under the regulations of the said company, be appropriated as a bonus to that policy, subject to and under the condition or proviso, amongst others, that, in case the defendant should go beyond the limits of Europe, the same should be null and void; and the plaintiff says, that the said condition or proviso, at the time of making the said indenture and from thence hitherto, was and is usual and reasonable; and that although he the plaintiff has performed and observed every thing in the said indenture on his part to be performed and observed, yet the defendant has broken his covenant made with the plaintiff as aforesaid, in this, to wit, that he the defendant, after the making thereof, and after the making of the said policy or insurance as aforesaid, and after he the plaintiff had paid to the said Rock Life Assurance Company divers, to wit, twelve annual premiums as aforesaid, payable in respect of the said policy or insurance as aforesaid, and after the sum that, under the regulations of the said company, would have been appropriated as a bonus to that policy, in case of the death of the defendant, had amounted to a large sum, to wit, 2,000*l.*, and had become of great value to the plaintiff, to wit, the value of 2,000*l.*, and after the said policy had become and was of great value to the plaintiff, to wit, of the value of 3,000*l.*, to wit, on the first day of June, 1838, he the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America, whereby and by reason of the premises the said policy became and was null and void, &c.

Special demurrer, assigning for cause that the declaration does not contain any specific averment that the defendant, before he went beyond the limits of Europe as in the declaration alleged, had received or had any notice from the plaintiff, or otherwise that the defendant had by any means been made or become aware of the fact,

that the plaintiff had insured the life of the defendant as in the declaration alleged, or that such insurance was subject to or under the condition or proviso in the declaration alleged; whereas the defendant could not be liable for going beyond the limits of Europe, unless he knew at the time that the policy had been effected, and that it was subject to the condition or proviso stated in the declaration.

Peacock, in support of the demurrer, was stopped by the Court, who called upon

Cowling to support the declaration. The declaration is sufficient. It was not necessary to allege any notice to the defendant; for the declaration states that the defendant did, at the request of the plaintiff, appear at the Rock Life Assurance Office, and did answer certain questions put to him; and he might, therefore, have informed himself of the fact of the insurance having been effected, and of the terms and conditions of it. The general rule is, that a party is not bound to do more than the terms of his contract oblige him to do; and here there is nothing in this covenant requiring him to give any notice. Therefore, unless the circumstances were such that the defendant had not any means of informing himself of it, no notice was necessary. This contract to insure is confined to insurance offices within the bills of mortality; and the defendant might readily have informed himself by inquiry of the fact of the insurance having been effected, and of the terms and conditions of it. In Com. Dig. tit. Condition, L. 9, many instances are given where parties are not bound to give notice, but the other parties must take notice at their peril. It is there said, "If a condition, covenant, or promise, be to do an act to a stranger, or upon performance of an act by a stranger, there needs no notice; for it lies equally in the knowledge of the obligor and obligee, and the obligor takes upon himself to do it; as if a condition be to pay when A. marries, there needs no notice when A. marries. So if a condition, covenant, or promise be to do upon the performance of any certain and particular act by the obligee himself, he ought to do it without notice by the obligee that the act is performed, for he takes it upon him to do it at his peril; as if the condition be to pay so much when the obligee marries, there need not be notice of his marriage." Notice is not necessary, unless where the party expressly contracts to give notice, or where it must necessarily be implied that notice is to be given, because the obligor cannot know or ascertain from the nature of the thing whether the act has been done or not. In Rex *v.* Holland[1] it was held, that where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts, as he is presumed from his situation to know them. In answer to the objection of want of notice, Wood says, in the argument, "Notice here merely means knowledge; and when the matter is as

[1] 5 T. R. 607.

much in the knowledge of the defendant, or more, than of any other person, the law presumes that he had knowledge;" for which he cites 16 Viner's Abr. tit. Notice, p. 5, pl. 10, where it is said, "None is bound by the law to give notice to another of that which that other person may otherwise inform himself of;" and Lord Kenyon, in giving judgment, refers to that argument, and recognizes it as showing "the true grounds upon which notice is or is not required to be averred." So here, the defendant might have informed himself whether the insurance was effected or not, and was bound to do so at his peril; and the plaintiff not having undertaken by his contract to give the defendant notice that the assurance was effected, was not bound to do so. The defendant by his covenant undertakes to do nothing to vitiate an insurance effected with any person within the bills of mortality, without any stipulation whatever as to notice of the particular person with whom it should be effected. [PARKE, B. If the covenant had spoken of an insurance to be effected with A. B., there would be no necessity for notice; but if it were with any person that the plaintiff may choose, then it must surely be necessary that notice should be given. Is not notice equally necessary, when the covenant applies to an insurance in any one of the many public offices within the bills of mortality?] If five or six offices had been named, no notice would be necessary. If there are such a number of insurance offices in London as would render it unreasonable to expect the defendant to inquire of them all whether such an insurance had been effected, the defendant should have shown that by his plea; not having done so, the Court will not assume it to be the fact. In Doe *v.* Whitehead,[1] which was an ejectment by landlord against tenant on an alleged forfeiture by breach of a covenant to insure "in some office in or near London," it was held that the omission to insure must be proved by the plaintiff. There the same objection would have applied, as it would have been necessary for the landlord to make inquiry at every office in or near London. Lord Denman, C. J., says, "The proof may be difficult, where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law; and the landlord might have had a covenant inserted in the lease to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as render the proof of a breach very difficult, the Court cannot assist him." Here the district is limited; but if the number of offices within it are so inconvenient as to render inquiry difficult, the Court cannot calculate the balance of inconvenience. Suppose all the insurance offices were in one street, no notice would surely in such case be necessary. [PARKE, B. Have you any authority for that, or in any case where there is any choice as to where the insurance shall be effected?] The cases cited in Com. Dig., before referred to, are applicable in principle: but there is no

[1] 8 Ad. & Ell 571, 3 Nev. & Per. 557.

case where the party's having a choice as to the office in which an insurance is to be effected, had been held to render notice necessary. In Viner's Abr., Condition (A. d.), pl. 15, it is said, "If A. sells to B. certain weys of barley or other things, and B. assumes to pay for every wey as much as he sells a wey for to any other man; if he after sells to others certain weys for a certain sum, he shall not have an action on the case against B. upon his promise till he hath given him notice for how much he sold the wey to others; for B. is not bound to pay it till notice, because it is uncertain and not known to him; and here he assumes in general and not in particular, *scilicet,* to pay so much as J. S. shall pay for a wey, and so he does not assume to take notice at his peril; "but," it is added in pl. 16, "if he had assumed to pay as much for every wey as he sold a wey for to J. S., if J. S. after bought a wey for a certain sum, he ought to take notice thereof at his peril without any notice given, otherwise he hath broke his promise." If, in the present case, the number of offices had been limited, it is quite clear that notice would not have been necessary, because the Court cannot measure the inconvenience arising from a greater or less number; and the same argument will apply where the district is limited. The defendant might have remedied the inconvenience, if any inconvenience exists, by providing for it in his contract.

Peacock, in support of the demurrer. The principle established by the cases is, that where the act is to be done by a stranger no notice is necessary, because the fact is as much within the knowledge of the one party as the other; but where the act is to be done by the plaintiff himself, it is otherwise, and notice must be given. Powle *v.* Hagger. There the Court expressly drew the distinction between the case where the act is to be done by a stranger, and where it is to be done by the plaintiff himself. [PARKE, B. In Bradley *v.* Toder, and in Fletcher *v.* Pynsett, where the promise was, in consideration that the plaintiff would marry such a woman the defendant would give him 100*l.*, it was held that notice of the marriage was not necessary.] In Bradley *v.* Toder the Court at first held that the declaration was not good, because it was not alleged that the plaintiff gave notice of the marriage; and though the Court afterwards resolved that it was good, the reason given is, that it was a necessary intendment; that when, after the marriage, he requested payment of the money, notice of the marriage was given. But this is an act which lies entirely within the knowledge of the plaintiff, who effected the policy and who alone could know the conditions annexed to it. All the cases turn upon the question, whether the defendant had the means of knowledge or not; and if he had not, or not equally with the plaintiff, then notice is requisite. [LORD ABINGER, C. B. Suppose the defendant had promised to pay 1,000*l.* to any banker in London that the plaintiff chose to open an account with, must not the plaintiff give him notice of the bank in which

he has opened an account? PARKE, B. Suppose the covenant had been, that the defendant would perform the terms and conditions of any policy that the plaintiff had entered into with the Rock Life Assurance Company, he must in that case have made inquiry as to the terms upon which the policy was effected.] In —— *v.* Henning it is said, "If the agreement be, that he shall pay so much as J. S. in particular paid, in that case, *quia constat de personâ,* and he is indifferently named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice; but when the person is altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice." In this case the plaintiff had the option of selecting any of the insurance offices, and he was not confined with respect to the time of effecting the insurance; and he ought, therefore, to have given notice. [PARKE, B. Suppose it had been a promise to pay the plaintiff 100*l.* if he should go to Rome or Naples?] There it would be his duty to give notice. When the event depends upon the performance of one of two acts which are in the plaintiff's option, he is bound to give notice, because it could only be known to the plaintiff when he had exercised his option. [PARKE, B. In Haverley *v.* Leighton the plaintiff promised J. S., that if he borrowed of one Powell 100*l.*, he would repay that sum to him upon the same day and upon the same conditions that they between them should agree upon, and it was there held that notice was not necessary.] That case shows that where the person or the act is certain, no notice is necessary; but when the person or the act is uncertain, and the option is to be exercised by the plaintiff, then it is necessary.

LORD ABINGER, C. B. I am of opinion that the defendant in this case is entitled to our judgment, on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place, and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant notice of his having exercised his option, and of the insurance having been effected, before an action can be maintained. But there is also another ground, which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality to ascertain whether such a policy had been effected, he would still be obliged to do something more, namely, to learn what were the particular conditions on which it was effected; because the covenant here is, not that the defendant shall not do any thing to evade the covenants or conditions usually prescribed by insurance offices, but that he shall not violate any of the conditions by which such insurance might be avoided or prejudiced; *i.e.*, he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now, some conditions totally distinct from

the conditions in general use might be annexed by a particular insurance office; and in such case it would be most unfair to allow the plaintiff to keep the policy in his pocket, and without notice of them to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were, that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all, it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled.

PARKE, B. My mind is not entirely free from doubt: but I am inclined, on the whole, to agree with the Lord Chief Baron. The defendant here is sued on a covenant by which he stipulates to do two things, namely, to appear at an office for the insurance of lives, within London or the bills of mortality, in order to enable the plaintiff to effect an insurance on his life; and, after it is effected, to perform the conditions which may be contained in it. And it does not appear that this is confined to an insurance to be effected at the particular office at which he should appear; the words "such insurance" in this covenant meaning simply an insurance on his life. The defendant is bound in the first instance to appear at an insurance office, and when the insurance is effected, he is then bound, as far as in him lies, to fulfil the stipulations which have been entered into by the policy. The question then is, whether an action can be maintained on this covenant, when notice of the effecting such insurance, or of its terms, is not averred in the declaration. The general rule is, that a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite; as in the case of Haule *v.* Hemyng,[1] where a man prom-

[1] Viner's Abr. "Condition" (A. d.), pl. 15; Cro. Jac. 422

ised to pay for certain weys of barley as much as he sold them for to any other man: there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and in such cases the right of the defendant to a notice before he can be called on to pay is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B., or perhaps on the marriage of B. alone (for there are some cases to that effect), or to pay such a sum to a certain person, or at such a rate as A. shall pay to B. In these cases there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at some office in London. Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the defendant the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case, for not only do the terms of the covenant apply to all actually existing companies of the sort, but to all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice, and I think, therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office; it might then, perhaps, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected. If, therefore, the more extended construction of this covenant is to be adopted, and the defendant's contract understood to extend to all existing and future companies, no doubt at all can exist upon the point. Supposing, however, that the covenant is to be construed in a limited sense, as restrained to any office where the party should have appeared to answer the questions relative to his health, &c., as the words "such insurance" seem, and perhaps with truth, to indicate, even then the option of the plaintiff

is of such an indefinite nature that the defendant cannot be called on to account for the non-observance of it, unless notice be given to him. Now here none has been given; there is, it is true, notice of an intention to effect a policy, but none either of its having been made at all, or made with any particular conditions. Possibly, if it had been notified, generally, to the defendant, that an insurance had been effected at a particular office, it would become his duty then to inquire into its nature, and the conditions with which it was coupled; but I think he was at least entitled to notice of the fact of its existence.

ALDERSON, B. I am of the same opinion; and my judgment is founded on the authority of Haule *v.* Hemyng, as reported in Viner's Abr. Condition (A. d.), pl. 15. In this case the defendant covenants that he will not do any act, deed, or thing, whereby any such insurance may be avoided or prejudiced. The insurance is to be effected at any time or times, or at any office or offices, within certain limits, and is not confined to the then existing offices. The plaintiff has the selection from an indefinite number; and it seems to me that the person who is to select the office must give notice of his having done so. If the defendant had received notice that an insurance was effected in the Rock Life Insurance Company, I by no means say that he would not be bound to inform himself of any conditions to which it might be subject.

ROLFE, B. I am of the same opinion. I own that when the case was first opened, my impression was in favor of the plaintiff; and for this reason, that when a party enters into a contract, he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable; but that is not so where a party contracts to do a particular act; for then it is his own fault for entering into such a contract. In the progress of the argument, my opinion changed; and I think that the plaintiff was bound to give notice. I find it stated in Viner's Abr. Condition (A. d.), pl. 10, "If I am bound to enfeoff such persons as the obligee shall name, he ought to give notice of those he names, otherwise I am not bound to enfeoff them;" and reason seems in favor of this principle of law. The question is, what is the meaning of the contract, where a party covenants to do something at the option of another? It must mean, provided he have notice of that option having been exercised. *Judgment for the defendant.*[1]

[1] Affirmed on error, 7 M. & W. 126. And see Phoenix Ins. Co. *v.* Doster, 106 U. S. 30; Spooner *v.* Baxter, 16 Pick. 409; Becket *v.* Gridley, 67 Minn. 37; McLean *v.* Republic Ins. Co., 3 Lans. 421; Genesee College *v.* Dodge, 26 N. Y. 213.

MAKIN *v.* WATKINSON

In the Exchequer, November 22, 1870

[*Reported in Law Reports, 6 Exchequer,* 25]

Declaration upon a covenant contained in a lease of a mill, and other buildings, with machinery and fixtures, by which the lessors (of whom the defendant was one) covenanted with the plaintiff (the lessee) that they would, at all times, during the demise, at their own expense, maintain and keep the main walls, main timbers, and roofs of the said buildings in good and substantial repair, order, and condition; alleging performance of conditions precedent, and a default in repairing, whereby, &c.

Plea: That the plaintiff gave no notice to the lessors of any want of repair in the main walls, main timbers, and roofs, nor that the same were not in good and substantial order and condition.

Demurrer and joinder.

Wills was called upon to support the plea. The only authority for the plea is a *dictum* of Mansfield, C. J., and Gibbs, J., in Moore *v.* Clark,[1] that "the lessor may charge the lessee without notice, for the lessor is not on the spot to see the repairs wanting; the lessee is, and therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know that repairs are necessary." The justice of this is the more obvious if its principle is applied to a similar case, that of a watch-maker selling a watch, with an agreement to keep it in repair for six months; it is plain that he could not be sued for non-repair unless the buyer required repairs to be done. The lessor in the one case, and the watch-maker in the other, not only would not, but could not, know that repairs were wanted unless notice was given; for they would have no right to insist upon examining the premises or the watch, and would be guilty of a trespass, if they did so against the will of the possessor. The *dictum* above cited is supported by several analogous cases. In Com. Dig. Condition, L. 10, it is laid down that "if a condition be that the lessee repair, and that the lessor find timber, the lessee ought to demand timber, and give notice how much will be sufficient." [Bramwell, B., referred to L. 8, "if a condition, covenant or promise, be to pay as much for goods as every other pays; the obligee shall give notice how much another pays."] In Vin. Abr. Condition (A. d.), pll. 13, 38, it is laid down that when the condition is an act to be performed by a stranger, the obligor must take notice at his peril; but in the case cited in the latter *placitum* (Pollen *v.* Kingesmeal, as stated in the margin), and in Harris *v.* Ferrand, reported in Hardr. 41, and cited in Vin. Ab. Notice, A. 2, pl. 12, the principle is more fully and more correctly stated that "notice is not

[1] 5 Taunt. at p. 96.

necessary where the thing lies as much in the cognizance of the one as the other; but where it lies more properly in the cognizance of the plaintiff than of the defendant notice is necessary." That principle was acted upon in Vyse *v.* Wakefield, and is entirely applicable to this case. [MARTIN, B. A distinction has always been made between a condition and a covenant. CHANNELL, B. The principle has been laid down, that where notice or demand is merely formal, the bringing of the action is sufficient notice, but not otherwise.] Here the notice is essential; if the lessor is to have no notice, extensive repairs may have been executed by the tenant, of which the lessor knows nothing, and of the necessity of which he has, after they are done, no means of judging, but for which he may be compelled to pay; and he may be made liable for consequential damage which he had no opportunity of preventing. [BRAMWELL, B. The case would be different if the covenant were, on the making of the lease, to *put* in repair. But the plaintiff's contention would reduce the lessor to a dilemma; if he went on the premises to repair, and repairs were not needed, he would be liable to be sued in trespass; if he did not go and repairs were needed, he would be liable for consequential damage, and he could have no knowledge whether they were or were not needed.]

Kemplay, in support of the demurrer. If the defendant is right, there is no difference between a covenant to repair and a covenant to repair on notice. The rule, is, that notice is not necessary unless it is stipulated for by the contract; see I Wms. Saund. 116, note to Cutler *v.* Southern, and 2 Wms. Saund. 62, n. (4), where all the authorities are collected; Cole's Case. [BRAMWELL, B. The covenant in Cole's Case was to save harmless, but if it had been merely to indemnify, must not notice have been given of the damnification?] The defendant's view cannot be sustained without adding words to the covenant, and there is no authority for such addition. [BRAMWELL, B. Words were added in Vyse *v.* Wakefield. The question is, whether in reason the covenant does not require the addition; we must construe it if possible as a covenant made by reasonable people.] It is not necessary for that purpose to add words; there is nothing unreasonable in it as it stands; the lessor being under an obligation to repair would have an implied license to do all things necessary. The *dictum* in Moore *v.* Clarke, was not necessary to the case; on the other hand, Coward *v.* Gregory[1] is in favor of the plaintiff. [BRAMWELL, B. There the covenant was to put the premises in repair, which implied they were out of repair.]

CHANNELL, B. I am of opinion that this is a good plea. The declaration is good, because it avers the performance of conditions precedent, which would include a request if a request is necessary. The question is, whether the plea denying the giving of notice is a good defence. I agree that the case of Moore *v.* Clark is not an

[1] Law Rep. 2 C. P. 153.

authority; because, although what was said there upon this point was said by two very eminent judges, one of them (Gibbs, J.) peculiarly conversant with pleading, and was illustrative of the matter under discussion, yet it was not necessary to the determination of the case. We must, therefore, look at the question apart from direct authority, and upon general principles. And, looking at it in this way, Vyse *v.* Wakefield is to some extent an authority, for it warrants the proposition that, when a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men, and intended what was reasonable. If, however, the language of the covenant is clearly inconsistent with the words sought to be added, I agree that, however absurd the covenant may be, it cannot be varied.

Now here repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might by observation acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, and the roofs are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of Vyse *v.* Wakefield, we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good.

Bramwell, B. I am also of opinion that the plea is good. To hold it to be so, we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition. The lessee is in possession; he can say to the lessor: "You shall not come on the premises without lawful cause;" and to come for the purpose of looking into the state of the premises would not be a lawful cause. If the lessor comes to repair when no repair is needed, he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed, and will be liable, not only to the cost of repair, but to consequential damage for injury to chattels caused by want of the repairs he had no opportunity of effecting. This is

so preposterous that we ought to hold that the parties intended the covenant to be read with the qualification suggested.

As to the authorities, we have, in the first place, an *obiter dictum* of two eminent judges, which was appropriate to the matter in hand, and is therefore of great value, though not binding. The authorities on analogous cases, collected in Comyns' Digest, are by no means clear; some seem one way, some another; and one, which occurs under the title Condition, L. 9, is very much in favor of the plaintiff. The case there referred to is Fletcher *v.* Pynsett,[1] where, it appears, the defendant covenanted with the plaintiff that, if he would marry the defendant's daughter, the defendant would assure to him a certain copyhold; and it was held that the plaintiff was entitled to sue without giving notice of the marriage. It seems to be suggested that, when the engagement is conditional upon the doing of an act by a third person, notice must be taken from that person. But this cannot be the reason of the rule; for in a case put under L. 8 of the title I have referred to, it is said that a promise to pay as much for goods as any other pays requires a notice of how much another pays.[2] But there seems no reason why the obligee should be less bound to give notice, or the obligor more bound to take notice, of the act of a stranger than of the act of the obligee himself, as in some of the cases put in L. 9, where it is said notice is not necessary.

If we look to the reason of the rule, it is that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary.

To have inserted a provision in the covenant, requiring notice, would certainly have been very reasonable. When it is a question of putting it into the covenant by implication, one must needs, as in all cases, have great doubt; but upon the whole, looking to the authorities, and bearing in mind what is said in Moore *v.* Clark, I think we are warranted in so reading the covenant.

Martin, B. I am of opinion that this plea is bad. I think that when we are construing a contract we ought to adhere to its words, and not insert words not to be found in it; otherwise it is impossible for the parties to know what are the obligations they have bound themselves to, or for counsel to advise with certainty. Now the

[1] Cro. Jac. 102; see to same effect, Roll. Abr. Cond. C. 1, 2, 3, 4, under the heading "At what time performance should be when no time is limited."

[2] Holmes *v.* Twist, the case there referred to, was decided by the Exchequer Chamber, reversing the judgment of the King's Bench, some judges of the court below, agreeing with the judgment of reversal (Hob. 51); the reason there assigned was, that the price was "a thing of his (the plaintiff's) private knowledge, and not like the case of bond to perform the award;" in Cro. Jac. 432, where the same case is referred to in a similar case of —— *v* Henning (Haul *v.* Hemmings, in 1 Roll. Rep. 285), it is said a difference was taken "if the agreement be that he shall pay so much as J. S. in particular paid; in that case *quia constat de persona*, and he is indifferently named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice." The latter reason seems to be adopted by Parke, B., in Vyse *v.* Wakefield (6 M. & W. at pp. 453, 454), as the *ratio decidendi* of these cases.

declaration states a covenant by the defendant to keep in good and substantial repair, and that the defendant did not keep in repair. In answer to this the plea alleges that there was no notice of want of repair. I think this plea bad, and for the simplest reason, that no such stipulation is contained in the covenant, nor any thing from which such a stipulation can be inferred.

I cannot perceive that the covenant as it stands is so unreasonable as is alleged. Moreover, there are in leases covenants to repair generally, and covenants to repair on notice; but if this covenant is construed in the way proposed, it is idle to require notice in terms; the one covenant will do as well as the other.

The authorities appear to me directly against the plea. The proposition laid down by Mr. Cowling *arguendo* in Vyse *v.* Wakefield is, I apprehend, perfectly correct: "The general rule is that a party is not bound to do more than the terms of this contract oblige him to do;" and all the judgments support what he says. Lord Abinger, C. B., says: "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it." Now, the assumption in the present case that the defendant cannot know without notice, is in my judgment, idle. PARKE, B., says: "The general rule is that a party is not entitled to notice unless he has stipulated for it; but," he adds, "there are certain cases where, from the nature of the transaction, the law requires notice to be given, though not expressly stipulated for;" he proceeds to describe those cases as cases where the thing to be performed is indefinite, and at the option of the plaintiff; and he decides the case before him on the ground that an option still remained to be exercised by the plaintiff. The present transaction is not of such a nature. Lastly, ROLFE, B., says: "I own that when the case was first opened my impression was in favor of the plaintiff; and for this reason, that when a party enters into a contract he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable; but that is not so when a party contracts to do a particular act, for then it is his own fault for entering into such a contract." I entirely agree with the rule of law so stated, and therefore think we are not at liberty to import any such stipulation into this covenant as the defendant claims.

Judgment for the defendant.[1]

[1] L. & S. W. Railway Co. *v.* Flower, 1 C. P. D. 77; Manchester Warehouse Co. *v.* Carr, 5 C. P. D. 507; Thomas *v.* Kingsland, 12 Daly, 315; Sinton *v.* Butler, 40 Ohio St. 158, *acc.*

HUGALL *v.* McLEAN

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, May 1, 1885

[*Reported in* 53 *Law Times Reports,* 94]

THIS was an action to recover a sum of £63 as damages for an alleged breach of an agreement to keep the drains and sewers of a house in tenantable repair.

The defendant, who was receiver in an administration action, let a house to the plaintiff for three years from August, 1882, by an agreement by which the defendant agreed to execute the "repairs to the roof, main walls, main timbers, drains, and sewers, which are to be kept in good tenantable repair and condition by the receiver during the tenancy."

On the 18th June, 1883, while the plaintiff was in occupation under the agreement, the basement of the house was flooded with sewage in consequence of the defective condition of the drains. The plaintiff thereupon sent for a sanitary engineer and instructed him to put the drains into a proper state of repair. On the 22d Sept., 1883, after the repairs had been executed, the plaintiff wrote to the defendant complaining of the expense to which she had been put, and asking whether she should send him the bill for the repairs. This was the first notice which the defendant received that the basement of the house had been flooded.

At the trial the jury found that the plaintiff did not know, and had not the means of knowing, that the drains were in a defective condition before the 18th June, 1883. They also found that the defendant did not know that the drains were in a defective condition before that date, but they found that he had the means of knowing.

Upon these findings Wills, J., gave judgment for the defendant.

The plaintiff appealed.

Lewis Coward, for the plaintiff.

Fullarton, for the defendant.

BRETT, M. R. The terms of the agreement in the present case are substantially the same as those of the covenant in Makin *v.* Watkinson, 23 L. T. Rep. N. S. 592; L. R. 6 Ex. 25; and as those of the act of Parliament in The London and Southwestern Railway Company *v.* Flower, 33 L. T. Rep. N. S. 687; 1 C. P. Div. 77, and therefore I am of opinion that we must give the agreement the same interpretation as was given in those cases. It is the case of an agreement drawn in the form of a common covenant in a lease, and the meaning of such a covenant was settled by a decision given nearly fifteen years ago (Makin *v.* Watkinson, *ubi sup.*); that decision has been followed in other cases, and no doubt many covenants in leases have been drawn on the faith of the interpretation placed on the covenant in that case. This being so, I think that, even if we dis-

agreed with the view adopted in Makin *v.* Watkinson, we should still be bound to give the same interpretation to the agreement in this case; but in my opinion it is impossible to doubt that the reasons for the interpretation placed on the covenant in Makin *v.* Watkinson are unanswerable. We must look at the implication which the judges made in that case, and which will be found at the end of the judgment of Channell, B., where he says: "We ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good." L. R. 6 Ex. at page 28. This shows that we must imply this condition as if it were written into the agreement; and if this is so the tenant must take care that the landlord has notice of the defective state of repair. I doubt whether, if the landlord had notice *aliunde* he would be liable, but it is not necessary to decide this. If he were told by a neighbor that the premises were out of repair it might happen that he would be unable to enter. Here the landlord, according to the finding of the jury, had the means of notice of the want of repair; but this does not help the plaintiff so as to enable her to treat the landlord as if he had had actual notice. It is clear that on such an agreement the landlord is not liable until he has had notice.

Baggallay and Bowen, L. JJ., concurred.

Appeal dismissed.[1]

ASHLEY HAYDEN *v.* WILLIAM BRADLEY

Supreme Judicial Court of Massachusetts, September Term, 1856

[*Reported in* 6 *Gray,* 425]

Action of contract to recover damages for the defendant's failure to keep in repair the buildings included in a lease from the defendant to the plaintiff of a hotel and farm in Southwick, by which the defendant covenanted to "put the buildings and fences on, around, and about the premises in a good condition, and so to maintain them for and during the term of" the lease, and the plaintiff covenanted "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent, or make or suffer any strip or waste thereof."

At the trial in the Court of Common Pleas the defendant, who resided in Springfield, contended that he was not liable, under his covenant, for damages arising from want of repair, after the plaintiff had entered into the occupation of the premises under the lease, and before notice to the defendant of such want of repair. But Mellen, C. J., instructed the jury that "for defects in the buildings, occurring after the commencement of the lease, the plaintiff was

[1] *Cf.* Meller *v.* Holmes, [1918] 2 K. B. 100.

entitled to recover it being the duty of the defendant, under this lease, to take notice of such defects or want of repair, and prevent damage to the plaintiff by repairing the same, without notice from the plaintiff." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. Vose, for the defendant.

W. G. Bates, for the plaintiff.

METCALF, J. The established rule of law, which the court are now to apply, is rightly stated by Lord Abinger in Vyse *v.* Wakefield, 6 M. & W. 452, 453. It is this: "Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." The case at bar comes within the first branch of this rule. The defendant stipulated to maintain the buildings in good condition during the term for which he demised them to the plaintiff, on the happening of a specific event, to wit, that they should not be in good condition, but should need repairs. He might have known, or made himself acquainted with the fact, that they needed repairs. And he did not stipulate for notice. See Smith *v.* Goffe, 2 Ld. Raym. 1126, and 11 Mod. 48; 1 Saund. Pl. & Ev. (2d ed.) 214; System of Pleading, 126, 127; Lawes Pl. in Assump. (Amer. ed.) 176 *et seq.*[1]

But if the defendant's agreement to maintain the buildings in good condition were not of itself sufficient to decide the question raised in this case, yet there is another clause in the lease which is decisive, namely, the reservation by the defendant of a right of entry upon the premises "to view and make improvements." He, therefore, having provided for himself the means of ascertaining the contingency upon which he was to make repairs, was not entitled to notice from the plaintiff that the contingency had happened. Keys *v.* Powell, 2 A. K. Marsh. 254. *Exceptions overruled.*

EBENEZER HUNT *v.* EDWARD ST. LOE LIVERMORE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL TERM, 1828

[*Reported in* 5 *Pickering,* 395]

ASSUMPSIT on a promissory note from the defendant to the plaintiff, not negotiable, dated February 26, 1823, for $1,400, payable on demand.

[1] In Hutchinson *v.* Cummings, 156 Mass. 329, 330, the court said in regard to an agreement to repair, "Assuming in favor of the plaintiff that this agreement bound the defendants to make all necessary repairs while Mrs. Dennin continued to occupy, it must be implied that they were only to make repairs upon reasonable notice."

At the trial before Morton, J., the plaintiff called a witness, who testified that on the 2d of December, 1824, the plaintiff demanded of the defendant payment of the note, or a return of the bond hereafter mentioned; but that the defendant did not pay the note, nor return the bond, but replied that what is written is written.

The defendant then gave in evidence a bond from the plaintiff, dated February 26, 1823, conditioned that the plaintiff, upon the defendant's paying him the sum of $1,400, should make and execute to the defendant a good and valid warranty deed of certain land which the defendant had agreed to purchase of the plaintiff for the sum mentioned.

The defendant also produced the following receipt, signed by the plaintiff: "February 26, 1823. Received of E. S. Livermore a note of hand for $1,400, for which I have this day given him a bond for a deed of a certain piece of land: but provided the bargain is not carried into effect, I am to deliver up said note upon said Livermore's delivering up said bond."

The defendant contended that the plaintiff was not entitled to his action before he had tendered a deed of the estate described in the bond, and that the defendant now had a right to rescind the contract referred to in the bond and receipt, and to return the bond to the plaintiff, which he offered to do in Court. But the judge, being of opinion that these facts did not amount to a defence against the note, directed the defendant to be called. If the whole Court should be of a different opinion, the default was to be taken off and the plaintiff to become nonsuit.

Livermore and *Hoar,* for the defendant. The three writings, bearing the same date and relating to the same subject-matter, are to be considered as one transaction, and they show a promise by the defendant to pay, provided the condition of the bond is performed. If the bargain was not carried into effect, the note was to be given up. The plaintiff therefore should have performed his part of the contract, or at least have tendered a deed of the land as a condition precedent to bringing an action on the note. Collins *v.* Gibbs, 2 Burr. 899; Thorpe *v.* Thorpe, 1 Ld. Raym. 662; s. c. 1 Salk. 171; Pordage *v.* Cole, 1 Wms. Saund. 320, note 4.

The note was a *nudum pactum.* No consideration was given for it: and, independent of that objection, it is not recoverable, for when the land was to be conveyed the money was to be paid; so that whether the bargain for the land should be carried into effect or rescinded, the note was to be given up. It was in fact a nullity.

Stearns, contra. It is manifest, on the face of the papers, that giving the receipt was an after transaction. The payment of the consideration is a condition precedent to giving a deed, but the note is unqualified in its terms, and being on demand might have been sued immediately.

But if the several writings were one transaction, they do not con-

stitute a defence against the note. If there was a mutual right to rescind, it was not without a limitation as to time, and nearly two years had elapsed before payment of the note was demanded; which allowed the defendant more than a reasonable time to make his election. Bothy's case, 6 Co. 31; Pothier on Obligations, No. 205.

The opinion of the Court was drawn up by

PUTNAM, J. We think that the note, the receipt, and the bond should be construed as if they were parts of one contract.

The plaintiff on his part agreed to convey the land to the defendant when he should pay the purchase-money, and the defendant agreed to pay the purchase-money when the plaintiff should convey the land. As no time for the conveyance or for the payment is mentioned, the law supplies the deficiency by providing that the contract should be executed in a reasonable time. And an offer to do what the contract required of either party, and a demand and refusal of the other to do what was required of him, would entitle the party so offering to perform to a remedy upon the contract. It is clear to our minds, that the contract is to be construed as containing dependent stipulations. Neither party intended to trust to the personal security of the other. If Hunt had in a reasonable time offered to give a good deed of the land, and had demanded payment of the money mentioned in the note, and Livermore had refused to accept the deed and to pay according to his engagement, Hunt would have had his remedy at law against Livermore for the purchase-money. On the other hand, if Livermore had in a reasonable time offered to pay his note, and had demanded a deed, and Hunt had refused to accept the money and to give the deed simultaneously, Livermore would have had his remedy at law against Hunt for the damages sustained by his not conveying the land according to his agreement.

If the stipulation contained in the receipt of the plaintiff to deliver up the note upon the defendant's delivering up the bond, "provided the bargain is not carried into effect," were to be construed to give either party an election at his own pleasure to annul the contract, it is evident that the contract could never be carried into effect against him who should please to avoid it. It would, in effect, have no binding operation. It would not be what the civil law defines, "juris vinculum quo necessitate adstringimur." "It is of the essence of all agreements which consist of promising something, that they should produce an obligation in the party making the promise to discharge it; hence it follows that nothing can be more contradictory to such an obligation than the entire liberty of the party making the promise to perform it or not as he may please." Pothier on Obig. No. 47, 48. The case at bar strongly illustrates that position. If it were that either party had the entire liberty of vacating it, the contract would be void for want of obligation. It would stand thus: Hunt engages to convey his land to Livermore for $1,400, if Hunt

shall please to do so; and Livermore engages to pay $1,400 for the land, if he shall please to do so. We cannot suppose the parties intended to make such a vain bargain. We are satisfied that it was a valid contract, containing dependent stipulations to be performed by each before he could compel a performance by the other. It follows, therefore, that the plaintiff was not entitled to the money or price of the land, inasmuch as he neglected to offer to convey the land by a proper deed.

We are all of opinion that the default should be taken off, and that the plaintiff should be nonsuited.[1]

BEECHER *v.* CONRADT

New York Court of Appeals, September Term, 1855

[*Reported in* 3 *Kernan,* 108]

Action commenced in the Supreme Court, in 1851, to recover the amount agreed to be paid by the defendant in and by the contract hereinafter mentioned. The complaint alleged the making of the contract; that it had been duly transferred to the plaintiff; that the party of the first part to the contract and the plaintiff had always fulfilled and kept all things therein contained on their part to be performed; that the defendant had neglected to pay the amount agreed to be paid by him; and that the whole amount of the principal and interest named in the contract was due and unpaid, and judgment for this amount was demanded. The answer put all the

[1] Smith *v.* Henry, 7 Ark. 207; Sorrells *v.* McHenry, 38 Ark. 127, 134; Perry *v.* Quackenbush, 105 Cal. 299; Tyler *v.* Young, 3 Ill. 444; Thompson *v.* Shoemaker, 68 Ill. 256, 259; Duncan *v.* Charles, 5 Ill. 561; Headly *v.* Shaw, 39, Ill. 354; Weiss *v.* Binnian, 178 Ill. 241; Bowles *v.* Newby, 2 Blackf. 364; Cunningham *v.* Gwinn, 4 Blackf. 341; McCulloch *v.* Dawson, 1 Ind. 413; Hickman *v.* Rayl, 55 Ind. 5515; Zebley *v.* Sears, 38 Iowa, 507; Little *v.* Thurston, 58 Me. 86; Smith *v.* Boston & Maine R. R., 6 Allen, 262; Fort Payne Co. & Iron Co. *v.* Webster, 163 Mass. 134; Siglin *v.* Frost, 173 Mass. 284; Sutton *v.* Beckwith, 68 Mich. 303; Powell *v.* Newell, 59 Minn. 406; Peques *v.* Mosby, 15 Miss. 340; Divine *v.* Divine, 58 Barb. 264; Hoag *v.* Parr, 13 Hun, 95; Ewing *v.* Wightman, 167 N. Y. 107; Shelly *v.* Mikkelson, 5 N. Dak. 22; First Nat. Bank *v.* Spear, 12 S. Dak. 108; Chandler *v.* Marsh, 4 Vt. 88; Acme Food Co. *v.* Older, 64 W. Va. 255, *acc.* See also Duncan *v.* Clements, 17 Ark. 279; Faust *v.* Jones, 23 Ark. 323; Falvey *v.* Woolner, 71 N. Y. App. Div. 331.

Moggridge *v.* Jones, 14 East, 486; Spiller *v.* Westlake, 2 B. & Ad. 155; Hageman *v.* Sharkey, 2 Miss. 277; Gibson *v.* Newman, 2 Miss. 349; Hazlip *v.* Noland 14 Miss. 294; Snyder *v.* Murdock, 51 Mo. 175; Lewis *v.* McMillen, 41 Barb. 420, *contra.* See also Tronson *v.* Colby University, 9 N. Dak. 559.

In many of the cases cited above it is not clearly brought out whether the court intended to decide that the plaintiff must show affirmatively as part of his case payment by him of his obligation, but this was decided in the following cases: Newsome *v.* Williams, 27 Ark. 632, 635; Cunningham *v.* Gwinn, 4 Blackf. 341; Summers *v.* Sleeth, 45 Ind. 598; Hatfield *v.* Miller, 123 Ind. 463, 466; School District *v.* Rogers, 8 Iowa, 316; Ewing *v.* Wightman, 167 N. Y. 107; Withers *v.* Atkinson, 1 Watts, 236, 246. In Maine, it has been held, however, that though default in payment by the plaintiff is a defence, such default must be shown by the defendant. Manning *v.* Brown, 10 Me. 49; Niles *v.* Phinney, 90 Me. 122.

allegations of the complaint in issue. The cause was tried at the Oneida County Circuit, held by Mr. Justice Gridley. The plaintiff read in evidence the contract mentioned in the complaint. It was dated the third day of January, 1839, and executed by Abraham Varick, as surviving executor of the will of one Walker, deceased, as party of the first part, and by the defendant as party of the second part. By the terms of this contract the party of the first part, in consideration of one cent to him paid, and "upon the express condition that the party of the second part shall and do well and faithfully perform the covenants hereinafter mentioned, and to be performed on his part," covenanted for himself and his assigns to execute and deliver to the party of the second part a deed of conveyance in fee, containing covenants of warranty against the acts of the grantor, of and for a parcel of land which was described in the contract; and the defendant, the party of the second part, covenanted to pay to the party of the first part or his assigns "the sum of three hundred and ninety-six dollars in five equal annual payments, with interest annually on all sums unpaid." The plaintiff further proved that the land mentioned in the contract was conveyed and the contract assigned to him in December, 1850, and rested. Thereupon the counsel for the defendant moved the court to nonsuit the plaintiff, on the ground, among others, that inasmuch as the action was brought to recover the whole amount of the purchase-money after the same had become due by the contract, the plaintiff could not recover without proving that he tendered a conveyance of the land, or offered to convey the same to the defendant before the commencement of the action. The Court overruled the objection, refused to nonsuit the plaintiff, and decided that he was entitled to recover the amount of the purchase-money mentioned in the contract. The counsel for the defendant excepted. The judgment rendered at the circuit was affirmed by the Supreme Court at a General Term, held in the Fifth District. The defendant apppealed to this court.

Samuel Beardsley, for the appellant.

Charles A. Mann, for the respondent.

Gardiner, C. J. The plaintiff has neither averred nor was there proof of any other breach of the contract upon the part of the defendant, except the non-payment of the purchase-money. The plaintiff had a right to sue for each instalment as they severally became payable; but this right he has waived, and now seeks to recover the whole purchase-money in this action, without an averment or proof of a tender of a conveyance or a readiness or willingness to convey. It is not denied by the court below that, if the several payments had been made as they fell due, and the suit had been commenced for the last instalment alone, the plaintiff must have made such an averment and sustained it by proof, if questioned; the point is too plain to admit of discussion. It is, however, said that a right of action

accrued as the instalments became payable, which the non-performance of the plaintiff would not discharge. This doctrine assumes a right, upon the part of the plaintiff, to divide his cause of action into as many suits as there were instalments. The first answer to this suggestion is, that the consideration for the conveyance by the vendor was an entire sum, to be paid by instalments; that the whole was due at the commencement of the action, and the plaintiff has sued for the whole purchase-money without attempting to distinguish, in his complaint or evidence, between the different instalments. The second answer is, that the plaintiff having elected to wait until the fifth and last instalment became due, and upon the payment of which, as this case stands, the defendant would be entitled to a deed, cannot now sustain his action for either instalment without proof of performance or readiness to perform on his part. The covenants, as to the four first instalments, were originally independent; but the plaintiff, by his omission to insist upon a strict performance by the defendant, has lost the right to bring more than one suit for the money which formed the consideration for his conveyance. The defendant, by a tender of the whole, which he has now a right to pay, would be entitled to his deed. The plaintiff on the other hand must establish his right to the consideration as an entirety, or he cannot recover anything. If he recovered in this action but $50, the judgment would be a complete bar to any further claim for the purchase-money, and when that judgment was paid the defendant would be entitled to his deed.[1]

The defendant could not protect himself against an action by an offer to pay the first, or all of the four first instalments; as the consideration was entire, and all due, the plaintiff could insist upon the whole. And yet, if because the covenants were originally independent they must always continue so, the defendant must have the right to discharge by payments what the plaintiff could enforce by action.

The truth is, the parties by lapse of time are in the same situation as though the purchase-money was all payable at one time. The defendant has lost his right to pay the instalments separately, and the plaintiff his right to enforce collection by separate suits. There is but a single cause of action, one and indivisible. The defendant, if he would obtain his deed, must pay all, and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration. The condition attaches to the whole debt and every part of it. The judgment of the Supreme Court should be reversed, and a new trial ordered.[2]

[1] See Burritt *v.* Belfy, 47 Conn. 323; Manton *v.* Gammon, 7 Ill. App. 201; Cockley *v.* Brucker, 54 Ohio St. 214. Compare Seed *v.* Johnston, 63 N. Y. App. Div. 340; McLaughlin *v.* Hill, 6 Vt. 20. See Herman on Estoppel, §§ 220, *et seq.*

[2] Hill *v.* Grigsby, 35 Cal. 656; McCroskey *v.* Ladd, 96 Cal. 455; Irwin *v.* Lee, 34 Ind. 319; Soper *v.* Gabe, 55 Kan. 646; Brentnall *v.* Marshall, 10 Kan. App. 488; Shelly *v.* Mikkelson, 5 N. Dak. 22; Boyd *v.* McCullough, 137 Pa. 7, 16; First Nat.

DENIO, JOHNSON, MARVIN, and DEAN, JJ., concurred.

CRIPPEN, J. (dissenting). The first and fifth grounds on which the motion for a nonsuit was asked may properly be resolved into one, and considered together, as they both present the same identical question. If the plaintiff was bound to prove the tender of a deed, or an offer to give such a deed to the defendant as the contract called for, prior to bringing his action to recover the purchase-money, then he failed to maintain the action, and the Court in that event erred in refusing the nonsuit. In order to determine this question, it will be necessary to refer with care to the terms of the agreement between Varick, the trustee, and the defendant. By this contract Varick agreed to convey lot No. 3, in Walker's patent, on the condition of a full and faithful performance of all the covenants contained in the contract to be performed by the defendant. On the part of the defendant, the first covenant made by him was that he would pay the trustee, Mr. Varick, his heirs or assigns, the just and full sum of $396 in five equal annual payments, with interest annually on all sums unpaid. The contract bears date on the third day of January, 1839; consequently, the last annual payment became due on the third day of January, 1844. This covenant of the defendant is not made to depend on any contingency or act of the other party, or on any condition to be found in the contract. When, then, let us inquire, did the defendant become entitled to the deed of said premises? The parties, by the plain language of the contract, have said that the defendant shall be entitled to such deed on the express condition that he shall pay the sum of $396 in five equal annual payments, from the third day of January, 1839, with annual interest. It is not easy to mistake the meaning of parties, when they use language so plain and emphatic in making their contracts.

The defendant most clearly was not entitled to a deed when the first, second, third, or fourth instalments became due, even if they had been punctually paid by him. So, also, in relation to the last instalment, the time for its payment was fixed by the agreement;

Bank *v.* Spear, 12 S. Dak. 108; Hogan *v.* Kyle, 7 Wash. 595, *acc.* See also McElwell *v.* Bridgeport Land Co., 54 Fed. Rep. (C. C. A.) 627.

Weaver *v.* Childress, 3 Stew. (Ala.) 361; Hays *v.* Hall, 4 Port. 374, 387; White *v.* Beard, 5 Port. 94, 100; Duncan *v.* Charles, 5 Ill. 561; Sheeran *v.* Moses, 84 Ill. 448; Gray *v.* Meek, 199 Ill. 136, 139; Allen *v.* Sanders, 7 B. Mon. 593; Coleman *v.* Rowe 6 Miss. 460; Clopton *v.* Bolton, 23 Miss. 78; McMath *v.* Johnson, 41 Miss. 439; Bowen *v.* Bailey, 43 Miss. 405; Biddle *v.* Coryell, 3 Har. (N. J. L.) 377, *contra.* See also Loud *v.* Pomona Land Co., 153 U. S. 564, 580; Bean *v.* Atwater, 4 Conn. 3; White *v.* Atkins, 8 Cush. 367; Kettle *v.* Harvey, 21 Vt. 301.

As to the effect in equity of a provision in the contract that payments which have been made shall be forfeited by failure to complete the purchase at the time named, see Ames's Cas. Eq. Jur. I. 338–341; 2 Williston Contracts, § 791.

In regard to sales of personal property the English Sale of Goods Act provides: "Sec. 41, (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: —

"(*b*) Where the goods have been sold on credit, but the term of credit has expired." This provision is copied in the American Uniform Sales Act, Sec. 54 (1) (*b*).

when the time arrived the money became due and payable from the defendant. No act was agreed to be performed on the part of the trustee or the plaintiff, as assignee of the contract, in order to entitle him to the money due on the last payment. The premises were to be conveyed on the express condition of the payment of the whole amount of the purchase-money.

No act whatever was agreed to be done by the trustee to entitle him to the money; or, in other words, the defendant agreed that he had no right to call for a conveyance, except upon the express condition that he paid the whole amount of the purchase-money. The case is clearly distinguishable from that of Grant *v.* Johnson, 1 Selden, 247. In that case the contract did not require the defendant to pay the whole amount of the purchase-money before obtaining a deed. He was entitled, by the terms of the agreement, to receive both the possession of the premises and a deed thereof before he could be called upon for the payment of the instalment in controversy in that action. Not so in the case at bar; and in this particular the cases are manifestly and clearly different. The defendant in this action had no right to ask for a deed, except upon the express condition that he first paid the full amount of the purchase-money. I have not been able to find any adjudged case conflicting with the plaintiff's right to recover in this action the amount due upon the contract.

The judgment should be affirmed.

HAND, J. (dissenting). I am of the opinion that the covenants to pay the purchase-money and to convey the land are independent. The defendant agreed to pay the purchase-money, and at certain specified times; and the vendor agreed to convey "upon the express condition" that he did so. No suit was commenced until all of the purchase-money became due. But that circumstance did not make the covenants dependent which before were independent. Where the last payment and the conveyance are to be simultaneous acts, and the prior payments have not been made, in a suit for the purchase-money, a performance or an offer to perform is necessary. Johnson *v.* Wygant, 11 Wend. 48; Grant *v.* Johnson, 1 Seld. 247. But that is not this case as I understand this contract. The payment of all the purchase-money was a condition precedent to the right of the defendant to demand a conveyance. Having covenanted absolutely to pay certain sums at the expiration of certain fixed periods, and the vendor having promised a deed on condition that the payments were made, the clear intention of the parties must have been that payment of all the money should precede the conveyance. There was no duty for the vendor to perform until the vendee had performed all the covenants on his part. By inserting the word "condition" or *"sub conditione,"* a condition is created. 10 Co. 42 *a;* 2 Bac. Abr., "Condition," (A.); Platt Covenants, 72. "Upon condition" is an expression from which a condition precedent usually arises. (Platt on

Covenants, *supra.*) The agreement here was not merely to convey "upon" payment being made, but "upon the express condition" that the vendee should perform; while the covenant to pay is without condition. And besides, the meaning of the words "upon condition" has been settled by consideration, which should not be disturbed.

For this reason I think the judgment should be affirmed.

Judgment reversed.

CHARLES H. EDDY ET AL., APPELLANTS, *v.* ALVIN DAVIS, RESPONDENT

NEW YORK COURT OF APPEALS, June 24–October 8, 1889

[*Reported in* 116 *New York,* 247]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 4, 1886, which reversed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term and granted a new trial.

The action was brought to recover from defendant unpaid instalments alleged to be due upon a contract to purchase land.

By the contract, which was executed March 1, 1875, plaintiff agreed to sell to defendant a lot of land in the village of Westport, upon which there was a brick store, for the sum of $1,600, payable in annual instalments varying from $100 to $200.

The contract provided that possession should be given on payment of the first instalment, and contained the following provisions: "The party of the second part (defendant) is to have one hundred feet depth of land including the store running east and west, running north and south the width of the store." "The said parties of the first part agree that on receiving the sum of eight hundred dollars at the time and manner above mentioned, they will execute and deliver to the said party of the second part, at their own proper cost and expense, a good and sufficient deed of said property by the party of the second part giving to the parties of the first part a bond and mortgage on said property for the remaining sum unpaid." "And the said party of the first part agrees to keep open a right of way back of said building." "It is understood that the party of the second part is to put up during the coming year a building on the east end of said store, to cost not less than six hundred dollars."

Defendant paid the first instalment under the contract, entered into possession and entered the building called for by the contract. He made other payments in amount about sufficient to pay the interest on the purchase-money. At the time of the commencement of the action two instalments, amounting to $300, were not due. At the time the agreement was made the plaintiffs owned other property adjoining the lot sold defendant, on the north, and bounded on the

west by the principal street of the village; and over this property access could be had from the street to the rear of defendant's lot.

In June, 1875, plaintiffs sold to one Joseph Hutchings all the rest of the property owned by them, without any reservation of a right of way to defendant's lot, and at the time of the commencement of this action they owned no property over which they could give a right of way to the rear of defendant's store.

Further facts appear in the opinion.

Richard L. Hand, for appellants.

Chester McLaughlin, for respondent.

BROWN, J. The trial court found, as conclusions of law, that the defendant "was not entitled to a conveyance of property, or of such right of way until the full sum of sixteen hundred dollars, the consideration provided by said contract, was paid, and that the provision in said contract for deeding the premises to the defendant, upon the payment of eight hundred dollars and interest, was for his (defendant's) benefit, and he could avail himself of it at his option, by paying such money at the times provided in the contract, and demanding a deed and tendering a bond and mortgage; not having paid or made such demand or tender, and having waived right to make any claim under this provision, as appears in the sixth finding of fact, the contract was to be treated as if it had been omitted, and the action having been brought to recover instalments due, no tender of a deed by the plaintiffs was necessary to enable them to maintain this action."

The sixth finding of fact referred to was as follows: "That immediately before the commencement of this action the plaintiffs, by their attorneys, applied to said defendant and informed him that plaintiffs were ready and willing to perform said contract on their part if he was ready to pay, to which defendant replied that he could not pay, and said he wanted to give up the property, and thereupon plaintiffs commenced this action."

It is undisputed that within two months after the defendant entered into possession of the property plaintiffs sold all their adjoining land, and thus put it out of their power to comply with their agreement with defendant, and keep open a right of way to the rear of his store; and at the time of the offer mentioned in the finding of fact I have quoted the plaintiffs were powerless to fulfil their agreement. The finding, therefore, that they were ready to perform, or that their offer and defendant's refusal constituted a waiver of tender of the deed cannot be sustained. A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be an existing capacity to perform. Nelson *v.* Plimpton Elevating Co., 55 N. Y. 484; Lawrence *v.* Miller, 86 id. 137; Bigler *v.* Morgan, 77 id, 318.

Here there was no existing capacity, as, having sold all the ad-

jacent lands, plaintiffs could not perform their covenant "to keep open a right of way" back of defendant's store. The conclusion of a waiver is not, therefore, sustained. If, however, the construction put upon the contract by the learned trial court, in the conclusion of law I have quoted, is correct, then the finding of a waiver of tender of performance is unimportant.

Never having paid $800 of the purchase-money, defendant was not in a position to demand the conveyance, and there being in the contract, as construed by the trial court, no covenant on the part of the plaintiff to deliver the deed until the full consideration was paid, tender of the conveyance as a condition precedent to recover for unpaid instalments was not necessary, and no question as to the sufficiency of the facts to constitute a waiver of tender could legitimately arise.

Where a contract for the sale of land provides for partial payments of the purchase-money prior to the delivery of the deed, the vendor may sue for such instalments when due without tendering a conveyance. Paine *v.* Brown, 37 N. Y. 228; Harrington *v.* Higgins, 17 Wend. 376.

But when, after the instalments are all due, the vendor brings an action for the purchase-money, he is not entitled to recover without proving an offer before suit to convey the land to the defendant on receiving the purchase-price. When the last instalment falls due the payment of the whole of the unpaid purchase-money and the conveyance of the land become dependent acts. Beecher *v.* Conradt, 13 N. Y. 108.

And the same rule applies when an action is brought for any instalment payable at or after the term fixed for the delivery of the deed. Grant *v.* Johnson, 5 N. Y. 257; Pordage *v.* Cole, 1 Saund. 320b, Sergeant Williams' note. So that if the fair interpretation of the contract is, as was held by the trial court, that there was no obligation on plaintiffs' part to deliver a deed until the whole of the purchase-money was paid, except in case of a demand therefor by defendant after payment of $800 and tender of a bond and mortgage for the balance of the purchase-price, then the judgment was right and must be affirmed.

We come, therefore, to the consideration of the question whether the learned trial judge was right in his construction of the contract that the provision for a delivery of the deed when $800 was paid was one for the benefit of the defendant, enforceable only on his demand, or whether it was a covenant on the part of the plaintiffs to deliver the conveyance at the time named.

We can find no support for the construction adopted by the trial court in the agreement itself, and it is not based upon any finding of fact.

The construction is harsh, unfair, and unnecessary. The parties appear to have provided expressly for all matters between them. We

expect naturally to find mutual obligations in the contract. The vendee agrees to pay the purchase-money, and we look for an agreement on the part of the vendor to convey. If it is not contained in the clause of the contract under discussion, it does not exist in express terms, and we are forced to imply it from the nature of the instrument.

In Robb *v.* Montgomery, 20 Johns. 15, cited by appellants, there was an express covenant on payment of the purchase-money, and a further provision that if, after the first payment was made, defendant wished to get a deed, and to give a bond and mortgage for securing the two last payments, plaintiffs would give a deed.

Thus the intent of the parties was clear that it was to be optional with the vendee whether he would take a deed on making the first payment.

Here there is no express covenant to give a deed at all, unless it is in the provision cited. The language used in this part of the contract does not express an option, but is that of a positive undertaking. It is: "Parties of the first part agree, on receiving the sum of eight hundred dollars, . . . that they will execute and deliver . . . a sufficient deed."

We think the intent of the parties is plainly inferable from the language used, that this was a covenant on plaintiff's part to convey at the time and under the circumstances mentioned.

We have, therefore, an action to recover unpaid instalments brought after the time stipulated for the delivery of the deed, and in such case, to entitle plaintiffs to recover, it was incumbent upon them to show an offer made before suit, to convey on receiving the stipulated part of the purchase-money. Grant *v.* Johnson, and Beecher *v.* Conradt, *supra.* The facts of this case are very similar to the cases cited. In Grant *v.* Johnson the contract was to sell the land for $950; $200 of which was payable in April, 1846, and $200 in April, 1847, and the balance in two annual payments thereafter.

The seller was to give possession in November, 1845, and a deed in May, 1846. The action was for the instalment due in April, 1847, and this court held that delivery of the deed was a condition precedent to the payment of the second instalment, and having made no tender, plaintiff could not recover.

In Beecher *v.* Conradt the purchase-money was payable in five instalments. None were paid, and after they were all due plaintiff brought an action for the whole purchase-money. This court held that while the covenants as to the first four instalments were originally independent, when the last instalment fell due, conveyance and payment were dependent acts, and that no part of the purchase-money could be recovered without tender of a conveyance before commencement of the action. To the same effect are Hoag *v.* Parr, 13 Hun, 95; James *v.* Burchell, 82 N. Y. 108; Smith *v.* McCluskey, 45 Barb. 621. The determination of the question what are and what

are not dependent covenants is not one free from difficulty, and many of the cases are so irreconcilable that they are studied with little profit or assistance to the judgment.

Each case must be determined by the cardinal rule of interpreting all contracts, viz., to ascertain the intention of the parties to the agreement; and here we think there is no doubt the intention was to deliver the deed of the property when $800 of the purchase-money was paid. For all the instalments falling due prior to that time plaintiffs might have brought their action and recovered without proof of offer to convey, but having waited until after the time fixed for the delivery of the deed, payment and conveyance became dependent and concurrent acts, and tender of performance was essential on their part to an enforcement of defendant's obligations under the contract. The case seems to fall directly within the spirit of the second rule suggested by Sergeant Williams in his note to Pordage *v.* Cole, *supra:* "When a day is appointed for the payment of money, and the day is to happen after the thing which is the consideration is to be performed, no action for the money can be sustained without averring a performance;" and the rights of the parties under such circumstances as exist in this case are clearly stated by Judge Gardner in Beecher *v.* Conradt as follows: "The defendant has lost his right to pay the instalments separately, and the plaintiff his right to enforce collection by separate suits. There is but a single cause of action, one and indivisible. The defendant, if he would obtain his dues, must pay all, and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration." None of the cases cited by the appellant are in conflict with the rule stated, under the construction we have given the contract.

Robb *v.* Montgomery, 20 Johns. 15, in one respect, I think, must be erroneously reported. The case states that the declaration averred non-payments of all the instalments.

If we are to understand by this that the action was brought to recover the whole purchase-money, and to regard the court as holding that no tender of conveyance was necessary, then the case is in conflict with all the later authorities. But if the action was to recover the first instalment only, then the decision is intelligible. I think the action must have been for the first instalment. The case as reported arose upon a demurrer by defendant to a replication to a plea in the answer and involved the single question whether the assignment of the contract and the conveyance of the land to Bemus by the vendor, before the first instalment was due (Bemus being ready and willing and having the capacity to convey to defendant) was a bar to the recovery. The court held that it was not, and in so deciding is in harmony with later decisions, which hold that in an action by a vendor for an instalment of purchase-money falling due prior to the time limited for the delivery of the deed, want of title in the vendor is not a defence. Harrington *v.* Higgins, 17 Wend. 376.

These and all kindred cases will be found, I think, to have arisen on independent covenants in contracts, and the rule established by them has no application in an action by a vendor for purchase-money brought subsequent to the day stipulated for the delivery of the deed.

The appellant makes the point that the agreement to keep open the right of way was a personal covenant, having no relation to the title, and its violation furnished no excuse for refusal to pay the purchase-money.

The appellant is not in a position to raise such a question, being concluded by the finding of the trial court, that such right of way was necessary to the proper enjoyment of the store, and that the parties intended that defendant should have such way, and that it should be conveyed to him with the store; and we think a right of way, which the trial judge found to constitute in value one half of the property agreed to be sold, cannot be regarded as an immaterial part of the consideration of the defendant's obligation. Having put it out of their power to convey the property which they had agreed to sell, the plaintiffs were not able to make a valid offer of performance, and hence not entitled to recover the unpaid purchase-money.

The order of the General Term was right and should be affirmed, and judgment absolute rendered for the defendant on the stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

EDWARD D. JAMES ET AL., APPELLANTS, *v.* JOHN J. BURCHELL, RESPONDENT

NEW YORK COURT OF APPEALS, June 17–September 21, 1880

[*Reported in* 82 *New York,* 108]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury. (Reported below, 7 Daly, 531.)

This action was brought to recover damages for the alleged failure of defendant to perform a contract.

On January 11, 1871, the parties entered into a contract by which the plaintiff, Sarah James, in consideration of one dollar, agreed "to sell and convey, or cause to be conveyed," as thereinafter stated, to the defendant four lots of land in the city of New York, for the sum of $11,000 for each lot. It was further covenanted that the defendant should commence the erection of four houses upon the lots on or before February 10, 1871, and complete the same within seven months from that date; the plaintiffs to advance $4,000 on each house to aid in its erection, and upon being paid and reimbursed the price

of said lots and advances thereon, either in cash or the bonds of the defendant, secured by mortgages on the premises, then the plaintiffs agreed "to convey, or cause to be conveyed," the same to the defendant, in fee by a full covenant warranty deed free from all reasonable objections and from all incumbrances, except such incumbrances as should be made, or caused or suffered to be made, by the defendant; the latter agreed to complete the contract and to take title within eight months. The plaintiffs also covenanted that Sarah James was seized in her own right of a good title to said premises in fee simple. It was also agreed that the plaintiffs at their election might mortgage each of said lots to the amount of $15,000, and convey the same subject to said mortgages in lieu of purchase-money for the same amount.

The court found that on the same day the contract was made plaintiffs conveyed the premises by warranty deed to Isaac B. Findull, subject to no incumbrances whatever. Defendant never entered into possession of the premises, but refused to erect the buildings because the plaintiffs could give no valid title to the property.

It appeared that some months after, but before the expiration of the eight months, Findull reconveyed to Mrs. James. Findull was a former clerk of James, and the conveyance to him was without consideration. He knew at the time he received the deed of the contract between the parties.

E. H. Benn, for appellants.

Osborn E. Bright, for respondent.

MILLER, J. The plaintiffs, in their contract with the defendant, covenanted that Sarah James, one of them, was seized in her own right of a good title to the premises in fee simple which were to be conveyed to the defendant; and it was further provided that the plaintiffs, if they so desire, could mortgage each of the lots to the amount of $15,000. On the same day after the contract bears date, and when the parties acknowledged its execution, the plaintiffs conveyed the premises by warranty deed to one Findull, subjected to no incumbrances whatever. The question presented is whether the plaintiffs had a right thus to impair the title, or in any other manner than by the mortgages provided for; and, as this conveyance was made to Findull, whether the plaintiffs had not violated the covenant, and the defendant was thereby released from any liability under the contract. The plaintiff's counsel insists that the fact that another person held the legal title for a portion of the intervening time, or that the defendant prior to the time fixed for taking title, was required by independent covenants to do certain acts and things toward the performance of the contract on his part, is immaterial. We think he is in error in this respect, and, under the provisions of the contract, the transfer of the title to Findull by the plaintiffs was important and material. By the contract, as will be seen by reference to the same, the defendant agreed to erect buildings upon the lots, of a certain style and quality, and of considerable value,

within seven months from the date, the plaintiffs to advance money from time to time on each of such buildings. The lots were to be conveyed by the plaintiffs by warranty deed, free from incumbrances, except such as should be caused or suffered by the defendant, who was to take title and pay for the same within eight months from date. It is apparent from the terms of the contract that the defendant must have relied to a considerable extent upon the personal responsibility of the plaintiffs. Upon the faith of an existing and perfect title in Mrs. James, he was to take possession, erect valuable buildings, and expend large amounts of money. The covenant that Mrs. James was seized and the permission given to mortgage the premises was not only an inducement for the expenditure of $60,000, to be made by the defendant, as the contract provided, but a guarantee that no other incumbrances should be placed upon the property. The covenant of seizin would be of no benefit if the plaintiffs could convey to a stranger without its violation, and compel the defendant to erect the buildings upon lands to which he might never acquire any title, and in that event to trust entirely to an action at law against the plaintiffs for reimbursement or indemnity. From the contract it is evident that the intention of the parties was that the defendant should be protected in taking possession of the premises and in the erection of buildings thereon, and under the circumstances of the case that the title should remain unimpaired in Mrs. James until the conveyance was delivered. Instead of this, on the very day the contract was acknowledged the plaintiffs conveyed the premises to Findull, who had been a clerk of Mr. James, and who took it in trust for Mrs. James and paid no consideration for the conveyance. They thus parted with all their right and title to the lot, and subjected the defendant to the hazard of losing what might be expended upon the same. As the testimony stood we think the defendant was not bound to proceed and complete the contract after the plaintiffs had parted with their title by a conveyance to a stranger.

The conveyance by the plaintiffs and the execution of the mortgages by the defendant, according to the contract for the price of the lots and advances, were to be simultaneous acts. In such a case the covenants are dependent, and there must be an existing capacity in the one who is to convey to give a good title. This distinction is stated fully by Spencer, J., in Robb *v.* Montgomery, 20 Johns. 15. The expenditure to be made, which was very large, should not, in view of the peculiar provisions of the contract, be regarded as an ordinary payment on account of the purchase-money, as the covenants were manifestly intended and must be considered as mutual and dependent. Judson *v.* Wass, 11 Johns. 525; Tucker *v.* Woods, 12 id. 190. We have carefully examined all the cases cited to sustain the proposition contended for by the plaintiffs' counsel, and we think that none of them uphold the doctrine that in a case presenting the characteristic features of the one at bar, a conveyance to a third party is not material.

Some stress is laid by the appellants' counsel upon the provision in the contract that the plaintiffs agreed "to sell and convey, or cause to be conveyed." This is not controlling; and taking the whole contract together, we think that the testimony shows that the defendant did not intend to accept any other warranty than that of the plaintiffs. That Findull knew of the contract with the defendant at the time he took the deed, and therefore he took it subject to the rights of the defendant, and could have been compelled to convey, is not important, for, as we have seen, the defendant lost the benefit of the plaintiffs' responsibility by the transfer of the title without any consideration whatever to a person of at least doubtful responsibility, and thus was not sufficiently protected in making the large expenditure required for the building of the houses. The defendant had a right to rely upon the responsibility of the plaintiffs under the contract, and the want of it may well have prevented the defendant from taking possession and from erecting the buildings as was intended. The subsequent reconveyance by Findull to Sarah James could have no effect in restoring the defendant's rights which were affected by the conveyance to Findull. The conveyance from Findull to the plaintiffs was not made until some months after the conveyance by the plaintiffs to him, and was recorded even long after that, and it is not proved to have been brought to the knowledge of the defendant. The defendant, with knowledge of the want of title in the plaintiffs, was not, under the covenants in the contract, bound to take possession and proceed with the erection of the buildings.

The question whether the deed to Findull was made and delivered before or after the making and delivery of the contract is not vital, as in either contingency the plaintiffs had broken the covenant of seizin, and as the covenants were dependent and mutual, the defendant was under no obligation to proceed and erect the buildings and fulfil the terms of the contract. In view of the covenants which have been considered, the contract was at an end when the conveyance was made to Findull. The finding of the judge, that the contract was executed and delivered upon the 11th day of January, 1871, being the time of its acknowledgment, instead of the day of its date, is therefore not material, and even if erroneous, cannot affect the result. For the same reason the refusal to find that the deed was delivered after the date of the contract was not erroneous. There was no error in refusing to send the case back for further findings, or in any of the refusals to find, or in any other respect.

The judgment should be affirmed.

All concur except Folger, C. J., and Rapallo, J., not voting, and Finch, J., absent at argument. *Judgment affirmed.*[1]

[1] Fort Payne Co. *v.* Webster, 163 Mass. 134; Meyers *v.* Markham, 90 Minn. 230; Brodhead *v.* Reinbold, 200 Pa. 618, *acc.* See also Leonard *v.* Bates, 1 Blackf. 172. Garberino *v.* Roberts, 109 Cal. 125; Webb *v.* Stephenson, 11 Wash. 342, *contra*. But see Brimmer *v.* Salisbury, 167 Cal. 522.

WILLIAM ZIEHEN, Respondent, *v.* DAVID J. SMITH, Appellant

New York Court of Appeals, January 30–February 25, 1896

[*Reported in* 148 *New York,* 558]

O'Brien, J. The plaintiff, as vendee, under an executory contract for the sale of real estate, has recovered of the defendant, the vendor, damages for a breach of the contract to convey, to the extent of that part of the purchase money paid at the execution of the contract, and for certain expenses in the examination of the title. The question presented by the record is whether the plaintiff established at the trial such a breach of the contract as entitled him to recover.

By the contract, which bears date August 10, 1892, the defendant agreed to convey to the plaintiff by good and sufficient deed the lands described therein, being a country hotel with some adjacent land. The plaintiff was to pay for the same the sum of $3,500, as follows: $500 down, which was paid at the time of the execution of the contract, $300 more on the 15th day of September, 1892. He was to assume an existing mortgage on the property of $1,000, and the balance of $1,700 he was to secure by his bond and mortgage on the property, payable, with interest, one year after date. The courts below have assumed that the payment of the $300 by the plaintiff, the execution of the bond and mortgage, and the delivery of the conveyance by the defendant, were intended to be concurrent acts, and, therefore, the day designated by the contract for mutual performance was the 15th of September, 1892. Since no other day is mentioned in the contract for the payment of the money, or the exchange of the papers, we think that this construction was just and reasonable, and, in fact, the only legal inference of which the language of the instrument was capable. It is not alleged or claimed that the plaintiff on that day, or at any other time, offered to perform on his part or demanded performance on the part of the defendant, and this presents the serious question in the case and the only obstacle to the plaintiff's recovery. It is, no doubt, the general rule that in order to entitle a party to recover damages for the breach of an executory contract of this character he must show performance or tender of performance on his part. He must show in some way that the other party is in default in order to maintain the action, or that performance or tender has been waived. But a tender of performance on the part of the vendee is dispensed with in a case where it appears that the vendor has disabled himself from performance, or that he is on the day fixed by the contract for that purpose, for any reason, unable to perform. The judgment in this case must stand, if at all, upon the ground that on the 15th day of September, 1892, the defendant was unable to give to the plaintiff any title to

the property embraced in the contract, and hence any tender of performance on the part of the plaintiff, or demand of performance on his part, was unnecessary, because upon the facts appearing it would be an idle or useless ceremony.

It appeared upon the trial that at the time of the execution of the contract there was another mortgage upon the premises of $1,500, which fact was not disclosed to the plaintiff, and of the existence of which he was then ignorant. That on or prior to the 21st of July, 1892, some twenty days before the contract was entered into, an action was commenced to foreclose this mortgage, and notice of the pendency of the action filed in the county clerk's office. That on the 30th of September following judgment of foreclosure was granted and entered on the 31st of October thereafter, and on the 28th of December the property was sold to a third party by virtue of the judgment, and duly conveyed by deed from the referee. It appears that the defendant was not the maker of this mortgage and was not aware of its existence, but it was made by a former owner, and the defendant's title was subject to it when he contracted to sell the property to the plaintiff.

The decisions on the point involved do not seem to be entirely harmonious. In some of them it is said that the existence, at the date fixed for performance, of liens or incumbrances upon the property is sufficient to sustain an action by the vendee to recover the part of the purchase money paid upon the contract. (Morange *v.* Morris, 3 Keyes, 48; Ingalls *v.* Hahn, 47 Hun, 104.) The general rule, however, to be deduced from an examination of the leading authorities seems to be that in cases where by the terms of the contract the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the non-performance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party. The qualifications to this rule are to be found in cases where the necessity of a formal tender or demand is obviated by the acts of the party sought to be charged as by his express refusal in advance to comply with the terms of the contract in that respect, or where it appears that he has placed himself in a position in which performance is impossible. If the vendor of real estate, under an executory contract, is unable to perform on his part, at the time provided by the contract, a formal tender or demand on the part of the vendee is not necessary in order to enable him to maintain an action to recover the money paid on the contract, or for damages. (Hudson *v.* Swift, 20 Johns. 24; Fuller *v.* Hubbard, 6 Cow. 13; Green *v.* Green, 9 Cow. 47; Hartley *v.* James, 50 N. Y. 38; Bigler *v.* Morgan, 77 N. Y. 312; Burwell *v.* Jackson, 9 N. Y. 547; Bogardus *v.* N. Y. Life Ins. Co., 101 N. Y. 328; Tamsen *v.* Schaefer, 108 N. Y. 604.)

In this case there was no proof that the defendant waived tender

or demand either by words or conduct. The only difficulty in the way of the performance on his part was the existence of the mortgage which the proof tends to show was given by a former owner and its existence on the day of performance was not known to either party. In order to sustain the judgment we must hold that the defendant on the day of performance was unable to convey to the plaintiff the title which the contract required simply because of the existence of the incumbrance. We do not think that it can be said upon the facts of this case that the defendant had placed himself in such a position that he was unable to perform the contract on his part and that his title was destroyed or that it was impossible for him to convey within the meaning of the rule which dispenses with the necessity of tender and demand in order to work a breach of an executory contract for the sale of land. It cannot be affirmed under the circumstances that if the plaintiff had made the tender and demand on the day provided in the contract that he would not have received the title which the defendant had contracted to convey. The contract is not broken by the mere fact of the existence on the day of performance of some lien or incumbrance which it is in the power of the vendor to remove. That is all that was shown in this case, and hence the judgment was recovered in violation of an important principle of the law governing contracts.

For this reason judgment should be reversed and a new trial granted, costs to abide the event.

All concur. *Judgment reversed.*[1]

Ex parte CHALMERS. In re EDWARDS

In Chancery, January 24–31, 1873

[*Reported in Law Reports, 8 Chancery Appeals,* 289]

This was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 19th of October, 1870, Messrs. Hall Brothers & Shaw, of Widnes, contracted to sell to the bankrupt Edwards 330 tons of bleaching-powder, upon terms which were stated in the following letter written by their agent: ——

"Dear Sir, — I have this day sold to you, on account of Messrs. Hall Brothers & Shaw, Widnes, 330 tons of bleaching-powder, 35 per cent, at 8*s.* 6*d.* per cwt., free on board here, to be delivered thirty tons per month from February to December, 1871, both inclusive. To be packed in oak casks, and to be unbranded. Payment by cash in fourteen days from date of each delivery, deducting 2½ discount."

Under the terms of this contract the monthly instalments up to and including the October instalment were delivered and paid for. The November instalment was delivered, but was not paid for.

[1] Higgins *v.* Eagleton, 155 N. Y. 466, *acc.*

On the 20th of December, 1871, Edwards called a meeting of his creditors, at which he declared himself insolvent. Messrs. Hall & Co. attended this meeting, and on the 23d of December they wrote a letter to Edwards in the following terms: —

"We give you notice that we refuse to deliver any more bleaching-powder upon contract."

Accordingly, the December instalment of bleaching-powder was never delivered.

On the 1st of January, 1872, Edwards filed a petition for liquidation by arrangement; but on the 19th of January it was resolved to proceed in bankruptcy, and he was adjudicated a bankrupt on the 8th of February following. Mr. Chalmers was subsequently appointed trustee.

Under these circumstances the trustee claimed the delivery of the thirty tons of bleaching-powder, and on Hall & Co. refusing to deliver them, he claimed, in the County Court at Liverpool, damages amounting to £150 against Hall & Co., for their breach of the contract. The County Court Judge having refused his application, the trustee applied to the Chief Judge in Bankruptcy, who affirmed the decision of the County Court Judge. The trustee now renewed the application before the Court of Appeal.

Sir G. Mellish, L. J., after stating the facts of the case, continued as follows: —

The first question that arises is, what are the rights of a seller of goods when the purchaser becomes insolvent before the contract for sale has been completely performed? I am of opinion that the result of the authorities is this — that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered. In Bloxam *v.* Sanders,[1] Bayley, J., says: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in a case of insolvency the point seems to be perfectly clear: Hanson *v.* Meyer.[2] If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue

[1] 4 B. & C. 941, 948. [2] 6 East, 614.

of his original ownership, to stop them *in transitu*. Why? Because the property is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has despatched the goods, and whilst they are *in transitu, à fortiori* is it when he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right."

In Wentworth *v.* Outhwaite,[1] PARKE, B., says "What the effect of stoppage *in transitu* is, whether entirely to rescind the contract or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu* till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more."

And in Griffiths *v.* Perry,[2] CROMPTON, J., says: "A vendor's lien on specific goods sold is gone when a bill is given for the price, but revives if that bill is dishonored before he has parted with possession of the goods; or rather, he then acquires, not a lien, strictly speaking, but a right of withholding delivery, analogous to the right of an unpaid vendor to stop *in transitu*. Miles *v.* Gorton,[3] and many other cases, show that a part delivery of the goods does not do away with the right to withhold delivery of the rest, unless such part delivery is intended as a delivery of the whole. Then does it make any difference here that the goods were not specific goods? I think that Valpy *v.* Oakeley[4] is conclusive to show that it does not; and I consider that case to have been rightly decided. . . . What, then, is the position of the parties upon the bill becoming dishonored and the vendee insolvent? According to LORD ABINGER'S view of the law in Miles *v.* Gorton, the contract to deliver is thereby put an end to altogether. I am not inclined to go so far as to say that; but I think that, at all events, the vendor has a right, in such a state of things, to say to the vendee, 'I will not deliver the goods until I see that I shall get my price paid.' So, in the present case the plaintiff, or his assignees in bankruptcy, could not, I think, call upon the defendant to deliver the rest of the iron without paying him for it."

[1] 10 M. & W. 436, 452.
[2] 1 E. & E. 680, 688.
[3] 2 Cr. & M. 504
[4] 16 Q. B. 941.

In both Bloxam *v.* Sanders and Wentworth *v.* Outhwaite there had been a sale of specific goods, not merely an agreement to sell goods to be delivered by instalments; but it would be strange if the right of a vendor, who had agreed to deliver goods by instalments were less than that of a vendor who had sold specific goods; and the judgment of CROMPTON, J., in Griffiths *v.* Perry, to which I have referred, shows clearly that there is no difference between the two cases.

I am, therefore, of opinion that, in the present case, when the insolvency of the purchaser had been declared the vendor was not bound to deliver any more goods until the price of the goods delivered in November, as well as those which were to be delivered in December, had been tendered to him. The only question then is, what was the effect of the vendor's letter of the 23d of December? Mr. Russell argued that the refusal to perform a contract before the time arrives for its performance is in itself a breach of the contract. But that can only be the case where the person who refuses to perform the contract is not entitled to refuse. Had the vendor in this case a right to refuse? In my view that depends upon the question whether the insolvent purchaser was ready and willing to pay the price both of the November and December instalments. It is clear that he was not. I admit that the mere non-payment of the price of the November instalment did not of itself give a right to the vendor to refuse to perform the contract; and I agree with what was said by CROMPTON, J., in Griffiths *v.* Perry, that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this would, without doubt, be allowed by his creditors or by the Court. If this were done, and due notice were given to the vendor, I entertain no doubt that he would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But where the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts. In the present case, Edwards, by calling his creditors together and informing them of his insolvency, practically gave notice to Hall & Co. that he did not mean to pay them either for the November or the December instalment. Indeed he could not pay for the November instalment without the consent of the other creditors; it would have been a fraudulent preference. Both parties knew that

he had no intention of paying any further sum; and Hall & Co.'s letter of the 23d of December only means that on the assumption, which assumption they were, under the circumstances, justified in making, that the November and December instalments would not be paid, they refused to deliver any more bleaching-powder. In my opinion they had a right to say that, and they committed no breach of the contract by writing the letter. The appeal must therefore be dismissed with costs.

Lord Selborne, L. C. I entirely agree in the judgment of the Lord Justice, and in the reasons he has given for it.

Sir Wm. James, L. J. I am of the same opinion.[1]

CHRISTIE *v.* BORELLY

In the Common Pleas, January 17, 1860

[*Reported in* 29 *Law Journal Reports, Common Pleas,* 153]

The first count of the declaration stated that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange of 100*l.* and 62*l.*, both drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., 75 Lower Thames Street, and both due on the 23d of January, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant in return engaged and guaranteed to the plaintiff the repayment of the sum of 300*l.* towards the payment of Scotch whiskeys, as follows: 6 puncheons, 5 hhds., 4 qr. casks, Auchtertool, 2 punchions, 5 hhds., 8 qr. casks, Anderton, which Mr. B. Fisse, of Norris Street, had ordered, and was about to receive from the plaintiff. Averment, by the plaintiff, that he had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to due performance by the defendant of his the defendant's part of the said agreement; and that the said two bills of exchange of 100*l.* and 62*l.* were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable; and that he the plaintiff delivered to the said Mr. B. Fisse the said Scotch whiskeys in the said agreement hereinbefore mentioned, and that the said Mr. B. Fisse, although requested to pay the said amount of 300*l.* towards the payment of the said Scotch whiskeys, had not paid for the said Scotch

[1] Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Morgan *v.* Bain, L. R. 10 C. P. 15; Mess *v.* Duffus, 6 Comm. Cas. 165; *Re* Phenix Bessemer Steel Co., 4 Ch. D. 108; Brassel *v.* Troxel, 68 Ill. App. 131; Rappleye *v.* Racine Seeder Co., 79 Iowa, 220; Hobbs *v.* Columbia Falls Co., 159 Mass. 109; Lennox *v.* Murphy, 171 Mass. 370, 373; Pardee *v.* Kanady, 100 N. Y. 121; Vandergrift *v.* Cowles Engineering Co., 161 N. Y. 435; Diem *v.* Kobditz, 49 Ohio St. 41; Dougherty Bros. *v.* Central Bank, 93 Pa. 227; Lancaster Bank *v.* Huver, 114 Pa. 216, *acc.* See also Uniform Sales Act, §§ 53, 54.

Compare *Ex parte* Pollard, 2 Low. 411; Stokes *v.* Baar, 18 Fla. 656; Chemical Nat. Bank *v.* World's Fair Exposition, 170 Ill. 82; C. F. Jewett Pub. Co., 159 Mass. 517 Bank Commissioners *v.* New Hampshire Trust Co., 69 N. H. 621.

whiskeys, nor the said sum of 300*l.* or any part thereof, and the same still remained wholly due and unpaid; yet that the defendant had disregarded and broken his said promise in this, that he had not paid, or caused to be paid, to the plaintiff the said sum of 300*l.* or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

The defendant pleaded (*inter alia*) secondly, to the said first count, that, although the said debt and sum of 300*l.* in the said first count mentioned, repayment whereof the defendant engaged and guaranteed to the plaintiff, was not payable, and, by the terms of the said order of the said Mr. B. Fisse, was not payable until after the said two bills drawn by Messrs. C. W. Olivier upon Messrs. Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and the defendant, at the time of the making of the said mutual agreement and guarantees, well knew; yet the said two bills of exchange of 100*l.* and 62*l.*, in the said first count mentioned, were not duly or at any time paid or retired by the said Messrs. Owen, of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue thereon.

The defendant having, at the trial, obtained a verdict in his favor on the issue taken on the second plea, the Court, in Michaelmas Term last, on the application of *Edward James,* granted a rule *nisi* to enter judgment for the plaintiff on such issue *non obstante veredicto,* on the ground that the said second plea was no answer to the action. Against this rule,

Petersdorf, Serjt., and *Garth* now showed cause.

Grant, in support of the rule.

Erle, C. J. I am of opinion that this rule should be made absolute: and that the plaintiff is entitled to have judgment entered for him *non obstante veredicto.* The real question is, whether the promises are independent promises, or whether they are mutual promises, their performance being mutually the consideration for each other. It appears to me that they are independent promises. The defendant guarantees the repayment of 300*l.* towards the payment of certain whiskey being paid for when due; and the plaintiff guarantees that two bills of exchange of 100*l.* and 62*l.* shall be paid when due. It, therefore, appears that the damages in respect of the breach on one side must be very different from the damages arising from the breach on the other side; on the one side they would be 300*l.*, and on the other only 162*l.*; it is consequently apparent, on the face of the contract itself, that it was not intended by the parties that performance of the one stipulation should be a condition precedent to performance of the other. The question is, to my mind, one entirely of fact, namely, what was the intention of the parties to this contract? The rules of law are agreed on by both sides, and it is only a question of construction. On the construction of this contract, I am of opinion that the performance of the plaintiff's promise

was not a condition precedent; and, therefore, that the second plea is no answer, and consequently that the rule ought to be made absolute.

Williams, J. The rules of law are now well established, and the object is to discover in each case what is the intention of the parties. If it had appeared from the contract in the present case, that the undertaking of the plaintiff had been to pay absolutely when the bills became due, the case would have been a very different one from what it is. What, however, the plaintiff undertakes is, only to pay if Messrs. Owen do not retire the bills; therefore, the compensation to be paid by the plaintiff, in consequence of such third party not doing their duty, is a matter which must have to be afterwards ascertained; and is it likely that it was the intention of the parties to this contract that the defendant's performance was not to take place until after such amount of compensation had been ascertained? It is, I think, obvious that such could not have been the intention of the parties; for Messrs. Owen might have retired the bills when due, and so there would have been nothing at all payable by the plaintiff.

Willes, J. I am of the same opinion. It appears to me that the promise only on the one side is the consideration for the promise on the other side; and that the plea is, therefore, a bad plea.

Rule absolute.[1]

DANIEL G. LEAVITT *v.* CHARLES G. FLETCHER

Supreme Judicial Court of Massachusetts, January Term, 1865

[*Reported in* 10 *Allen,* 119]

Contract brought by a lessee against a lessor to recover damages for a breach of the covenant to repair. The material portions of the lease and the agreed facts upon which the case was submitted to the determination of the whole court are stated in the opinion.

D. S. Richardson & B. J. Williams, for the plaintiff.

T. H. Sweetser & W. S. Gardner, for the defendant.

Gray, J. By the indenture upon which this action is brought the defendant "does lease, demise, and let" to the plaintiff a brick stable standing on the lessor's own land, and a wooden carriage-house standing on land held by him under a lease from others, with a provision that if they shall require the termination of that lease and the removal of the carriage-house, the plaintiff may terminate this lease. The lessor "agrees to make all necessary repairs on the outside of said building." The lessee agrees to pay a certain rent monthly, and to quit and deliver up the premises to the lessor at the end of the term "in as good order and condition, reasonable use

[1] Gibson *v.* Goldsmith, 5 D. M. & G. 757; Mutual Life Ins. Co. *v.* French, 30 Ohio St. 240. Alexander *v.* Continental Ins. Co., 67 Wis. 422, *acc.* Compare Griggs *v.* Moors, 168 Mass. 354; Martin *v.* Schoenberger, 8 W. & G. 367.

and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessor;" not to make or suffer any waste thereof; and "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof. And said lessee is to make all necessary repairs on the inside of the building at his own expense."

The brick stable is the building mentioned in the lease next before the lessor's covenant to make outside repairs; but we have no doubt that this covenant includes all the premises leased by the defendant to the plaintiff, the carriage-house as well as the stable. Indeed in the duplicate indenture in the hands of the defendant the plural word "buildings" is substituted for "building" in this covenant.

The facts agreed by the parties are as follows: The carriage-house was a frame covered with matched boards, had a shingled roof and a plank floor, and on the inside was left uncovered by lath or plaster. While the plaintiff was occupying the premises under the lease, a quantity of snow accumulated upon the roof of the carriage-house, until, at the close of a heavy snow storm, the carriage-house fell from the weight of snow, crushing and injuring the plaintiff's carriages kept therein. The plaintiff afterwards demanded of the defendant that he should restore and rebuild the carriage-house, but the defendant refused to do so. There is nothing in the case to show that any negligence of either party contributed to the accident.

For five months succeeding the fall of the carriage-house, the plaintiff paid to the defendant, under protest, the rent reserved in the lease; and then, ceasing to pay rent, was ejected by the defendant. The lessee's covenant to pay rent was not affected by the injury to the premises, nor limited by the exception of unavoidable casualty in his subsequent covenant, and is independent of the lessor's covenant to make outside repairs. Belfour *v.* Weston, 1 T. R. 310; Hare *v.* Groves, 3 Anstr. 687; Kramer *v.* Cook, 1 Gray, 550, and cases cited. And it is not now denied that the lessee was rightly required to pay rent, and lawfully ejected for failing to pay.[1]

The lessee in this action claims damages, 1st, for the injury occasioned by the fall of the carriage-house; 2dly, for the failure of the lessor to rebuild it, after being expressly requested so to do.

It is well settled that in a lease of real estate no covenant is implied

[1] Dawson *v.* Dyer, 5 B. & Ad. 584; Suplice *v.* Farnsworth, 7 M. & G. 576; Edge *v.* Boileau, 16 Q. B. D. 120; Lewis *v.* Chisholm, 68 Ga. 40; Palmer *v.* Meriden Brittannia Co., 188 Ill. 508; Thomson-Houston Co. *v.* Durant Land Co., 144 N. Y. 34; Prescott *v.* Ottenstatter, 85 Pa. 434, *acc.* But if a landlord covenants to keep premises in repair, and nevertheless allows the premises to become untenantable, the tenant may abandon them, and thereby terminate his liability for rent. Lewis *v.* Chisholm, 68 Ga. 40; Bizzell *v.* Lloyd, 100 Ill. 214; Sheary *v.* Adams, 18 Hun, 181 (statutory); McCardell *v.* Williams, 19 R. I. 701.

A promise to put in repair was held a condition precedent to the obligation of the lessee to take the premises in Hickman *v.* Rayl, 55 Ind. 212. And so to the obligation of one who had agreed to purchase. Tripp *v.* Smith, 180 Mass. 122. Compare Shenners *v.* Pritchard, 104 Wis. 257.

that the lessor shall keep the premises in repair or otherwise fit for occupation. Dutton *v.* Gerrish, 9 Cush. 89; Foster *v.* Peyser, id. 242, and cases cited; Welles *v.* Castles, 3 Gray, 326. The express covenant of the defendant in this case is only "to make all necessary repairs on the outside of the building." He does not covenant that the outside shall not give way, but that, if it does, he will repair it. He cannot therefore be held liable for the damages occasioned by the fall of the building.

But it has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger. Year-book 40 Ed. III. 6; Dyer, 33*a;* Paradine *v.* Jane, Aleyn, 27; s. c. Style, 47; Compton *v.* Allen, Style, 162; Bullock *v.* Dommitt, 6 T. R. 650; Green *v.* Eales, 2 Q. B. 225; s. c. 1 Gale & Dav. 468; Phillips *v.* Stevens, 16 Mass. 238; Bigelow *v.* Collamore, 5 Cush. 231; Allen *v.* Culver, 3 Denio, 294; Dermott *v.* Jones, 2 Wallace, 7, 8. The defendant's covenant contains no exception of natural causes or inevitable accident. "The outside of the building" includes the whole outer shell of the building, or external inclosure of roof and sides. Green *v.* Eales, above cited. "The necessary repairs on the outside" are those which will make the building outwardly complete. When those are made, then, and not before, the lessee will be bound by his covenant "to make all necessary repairs on the inside." The fact that rebuilding the outside will so far replace the whole building as to leave very little to be done on the inside, and thus make the performance of the lessee's covenant very easy, does not in any degree excuse the lessor from first performing his covenant. The defendant is therefore responsible for the damages suffered by the plaintiff by reason of the defendant's refusal to rebuild, from the time of that refusal until the ejectment of the plaintiff for not paying his rent; and according to the agreement of the parties the case must stand for the assessment of those damages.

Judgment for the plaintiff accordingly.[1]

BLANDFORD *v.* ANDREWS

In the Queen's Bench, Michaelmas Term, 1599

[*Reported in Croke Elizabeth,* 694]

Debt on an obligation of 80*l.* conditioned that if the defendant procured a marriage to be had between the plaintiff and one Bridget Palmer, at or before the feast of St. Bartholomew then next following, that then, &c. The defendant pleaded that the plaintiff, before

[1] As to the liability of a covenantor to repair the consequences of extraordinary casualties, see 3 Williston Contracts, § 1967.

that feast, came to the said Bridget Palmer and called her whore; and told her that, if he married her, he would tie her to a post; and used other opprobrious words unto her; by reason whereof the defendant could not procure the said marriage before the said feast. Whereupon the plaintiff demurred. *Williams,* Serjt., moved that this was not any plea; for he hath not shown that he used his endeavor to procure the marriage; for it may be that, notwithstanding these words, they would have intermarried. And of that opinion was all the Court; for the defendant ought to show that there was not any default in him, and that he did as much as in him lay to procure it; otherwise he doth not save his obligation; and these words spoken before the day, at one time only, are not such an impediment but that the marriage might have taken effect. Wherefore it was adjudged for the plaintiff.

UNITED STATES *v.* PECK
PECK *v.* UNITED STATES

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1880

[*Reported in* 102 *United States,* 64]

APPEALS from the Court of Claims.

Peck, the claimant, entered into a contract with the proper military officer to furnish and deliver a certain quantity of wood and hay to the military station at Tongue River, in the Yellowstone region, on or before a specified day. He furnished the wood, but failed to furnish the hay, which was furnished by other parties at an increased expense. The accounting officers of the government claimed the right to deduct from the claimant's wood account the increased cost of the hay. Whether this could lawfully be done was the principal question in the cause.

The Court, upon an examination of the contract and of the surrounding circumstances of the case, were of opinion that the contracting parties, in stipulating relating to hay, contemplated hay to be cut in the Yellowstone valley, and specially at the Big Meadows near the mouth of Tongue River, — which was, indeed, the only hay which the claimant could have procured within hundreds of miles, and which it was known he relied on. The government officers, fearing that the claimant would not be able to carry out his contract, and it being absolutely necessary that the hay should be had, allowed other parties to cut the hay at Big Meadows, and therewith to supply the Tongue River station. The claimant complained of the double injury: first, of giving the hay which he relied on to other parties; and, secondly, of charging him for the increased expense of getting it. The question was whether the surrounding circumstances could

be taken into consideration in the claimant's excuse, although the contract made no mention of the source from which he was to procure the hay to be supplied by him to the government.

Mr. Assistant Attorney-General Smith, for the United States.

Mr. John B. Sanborn, contra.

Mr. Justice Bradley, after stating the case, delivered the opinion of the Court.

We think that the facts of the case clearly bring it within the rules allowing the introduction of parol evidence: first, for the purpose of showing, by the surrounding circumstances, the subject-matter of the contract, namely, hay to be cut and gathered in the region where it was to be delivered; secondly, for the purpose of showing the conduct of the agents of the defendants by which the claimant was encouraged and led on to rely on a particular means of fulfilling his contract until it was too late to perform it in any other way; and then was prevented by these agents themselves from employing those means. The supply of hay which he depended on, and which under the circumstances he had a right to depend on, was taken away by the defendants themselves. In other words, the defendants prevented and hindered the claimant from performing his part of the contract.

That the subject-matter of a contract may be shown by parol evidence of the surrounding circumstances, see Bradley *v.* Washington, Alexandria, & Georgetown Steam Packet Co., 13 Pet. 89; Thorington *v.* Smith, 8 Wall. 1; Maryland *v.* Railroad Company, 22 id. 105; Reed *v.* Insurance Company, 95 U. S. 23; 1 Greenl. Evid. sect. 277; Taylor, Evid. sect. 1082. And that the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison, Contracts, sect. 326; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528. In the case last cited, the defendant was sued on a bond obliging him by a certain time to procure and cancel a mortgage of the plaintiff and deliver the same to him. The defendant was allowed to prove by parol that he procured the mortgage, and, having inquired of the plaintiff what he should do with it, was directed to place it in the hands of a third person. This was held to be an excuse for not having fully performed the condition. Judge Thompson said: "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond." So when A. gave to B. a bond to convey certain premises, but they subsequently agreed by parol to rescind the contract, and A. thereupon sold the premises to a third person, it was held that though the bond was not cancelled or given up, nor any of the papers changed, yet by the parol agreement and the acts of

the parties under it the bond was discharged. Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; and see 2 Cowen Hill's Notes to Phillips on Evid. 605. The principle involved in these cases is applicable to the present.

Judgment affirmed.[1]

SIR ANTHONY MAYNE'S CASE

In the Queen's Bench, Easter Term, 1596

[*Reported in* 5 *Reports,* 20*b*]

The case in effect was, that Sir Anthony Mayne did lease certain land to Scott for twenty-one years by indenture, and covenanted that at any time during the life of Scott, upon surrender of his lease, Sir Anthony, &c., would make a new lease during the residue of the years, and bound himself to perform the covenants, &c. And now in debt on the said obligation by Scott against Sir Anthony, he pleaded that Scott did not surrender, &c. To which Scott replied, and said, that after the said lease Sir Anthony had accepted a fine *sur conusans de droit come ceo,* &c., and by the same fine granted and rendered the land to the conusee for eighty years: upon which the defendant did demur in law. And it was adjudged for the plaintiff. And in this case three points were resolved: —

1. That Sir Anthony Mayne had broken his covenant without any surrender made; for, by the said fine levied by him for eighty years, he had disabled himself either to take a surrender or to make a new lease; and the law will not enforce any one to do a thing which will be vain and fruitless; *lex neminem cogit ad vana seu inutilia peragenda:* but it would be vain to compel him to make a surrender to him who cannot take it; and although the lessee in this case by the words of the indenture ought to do the first act, *scil.* to make the surrender, yet when the lessor hath disabled himself, not only to take the surrender, but also to make a new lease according to the covenant, for this cause the lessor's covenant is broken without any surrender made. *Vide* 32 E. III., Barre 264, and 21 E. IV., 55 *a.* If you are bound to enfeoff me of the manor of D. before such a feast, if you make a feoffment of the said manor to another before

[1] Lancashire *v.* Killingworth, 1 Lord Ray. 686; Mackay *v.* Dick, 6 App. Cas. 251; Anvil Mining Co. *v.* Humble, 153 U. S. 540, 552; Kingman *v.* Western Mfg. Co., 92 Fed. Rep. 486; Tennessee, &c. R. R. Co. *v.* Danforth, 112 Ala. 80; Wolf *v.* Marsh, 54 Cal. 228; Love *v.* Mabury, 59 Cal. 484; Griffith *v.* Happersberger, 86 Cal. 605; Durland *v.* Pitcairn, 51 Ind. 426; King *v.* King, 69 Ind. 467; Dill *v.* Pope, 29 Kan. 289; Jones *v.* Walker, 13 B. Mon. 163; De La Vergne Co. *v.* New Orleans Co., 51 La Ann. 1733; North *v.* Mallory, 94 Md. 305; Grice *v.* Noble, 59 Mich. 515; Lee *v.* Briggs, 99 Mich. 487; Gallagher *v.* Nichols, 60 N. Y. 438; Nichols *v.* Scranton Steel Co., 137 N. Y 471; Baker *v.* Woman's Union, 57 N. Y. App. Div. 290; Guilford *v.* Mason (R. I.) 53 Atl. Rep. 284; Olson *v.* Snake River Co., 22 Wash. 139; Jones *v.* Singer Mfg. Co., 38 W. Va. 147. *acc.*

See also District of Columbia *v.* Camden Iron Works, 181 U. S. 453; Holt *v.* Silver, 169 Mass. 435; 59 Am. St. Rep. 283, *n.*

the said feast, you have forfeited your obligation, although you repurchase the land again before the feast, because you were once disabled to make the feoffment. And therewith agreeth Temp. E. I., Covenant 29. A man leased a manor for years, and the lessee covenanted to keep the houses of the manor and as much as was in the manor in as good plight as he found them; during the term the lessee committed waste in the houses, and in cutting of oaks; the lessor brought an action of covenant before the end of the term for the oaks, because for them it was impossible that the covenant should be performed; otherwise it is of the houses, and therewith agree F. N. B. 145 K, and 13 E. III., Tit. Covenant 2.

2. It was resolved, if a man seised of lands in fee covenants to enfeoff J. S. of them upon request, and afterwards he makes a feoffment in fee of the said lands; now in this case J. S. shall have an action of covenant without request. And that in effect is all one with the principal cause.

3. It was resolved that, in the case at bar, if the said term of eighty years were but an interest of a future term, so that Scott notwithstanding that might make the surender, yet in such case Scott should have an action of covenant without making any surrender; for true it is that he may surender; but also true it is that Sir Anthony after such surrender canot make the new lease, which was the effect that the surrender should produce; and therefore inasmuch as the lessor hath disabled himself to make a new lease, which is the effect and end of the surrender, and that which he ought to do in his part, the lessee shall not be enforced to make the surrender, which is the first thing to be done on his part, for by the surrender he would lose his old term without a possibility of having the new according to the lessor's covenant. And therewith agreeth 14 H. IV., 19 *a.* J., person of the church of G., was bound in an obligation of 100*l.* to the prior of E.; the condition was that if the parson resign his church within certain time to the prior for a certain pension as they could agree, that then the obligation should be void; and afterwards and within the time the prior and parson agreed of a pension of 5*l.*, yet the parson did refuse to resign. And the opinion of the whole Court was that, although they had agreed of the pension, yet the parson is not bound to resign until the prior hath tendered him a deed of the said pension, by which he might be sure of it.[1]

[1] "If a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the act which he has so rendered himself unable to perform." Per Maule, J., Sands *v.* Clarke, 8 C. B. 751, 762, citing Mayne's case, *supra;* and see Newcomb *v.* Brackett, 16 Mass. 161.

SHALES *v.* SEIGNORET

In the King's Bench, Easter Term, 1699

[*Reported in* 1 *Lord Raymond,* 440]

Covenant upon articles of agreement. The plaintiff declares that it was covenanted and agreed between him and the defendant that he, in consideration of twenty guineas by the defendant to him then paid, should transfer to the defendant before or upon the 19th of November, 1695, 1,000*l.* of bank stock; and that the defendant covenanted with the plaintiff to accept it upon notice of three days, and to pay to the plaintiff for it 940*l.*; and then the plaintiff avers that no bank stock is transferable by law but in the office of the Bank of England, in the presence of both the parties; and that he gave three days' notice to the defendant that he would transfer to him the bank stock in the office of the Bank the 19th of November; and that he attended there the whole day to have transferred it; but that the defendant did not come to accept it; for which he brings his action for the 940*l.*, &c. The defendant, after oyer of the articles, pleads that the plaintiff nor none of his assigns had any interest in any bank stock upon the 18th of November, &c. The plaintiff demurs. And the whole Court was of opinion that the plea was ill; because, though the plaintiff had not any bank stock upon the 18th of November, yet, if he had it the 19th, he might have performed the contract within the time; for the covenant was not that he should transfer any particular 1,000*l.* of bank stock which he had at the time of the covenant, but any 1,000*l.* of stock. But then the whole Court held: 1. That this action will not lie for the plaintiff in this case, because it appears that the plaintiff has not transferred; and, without transfer to the defendant, the defendant is not bound to pay the money, for the money was to be paid upon the transfer; and, therefore, no transfer, no money. Co. Lit. 304;[1] Dyer, 371; 2 Mod. 266, Otway *v.* Holdips. But the matter in the declaration might have been a good excuse for the plaintiff, if the defendant had sued him for not transferring the bank stock; or the plaintiff might have assigned his breach in the non-acceptance of the stock by the defendant.[2] 2. The Court held that it did not appear to the Court but that the bank stock was transferable at another place than at the office of the Bank; for though the act says that no transfer shall be but as the king shall appoint, and the king has appointed it to be at the office of the Bank, and not in any other place; yet that ought

[1] "If a man plead performance of covenants, and the plaintiff reply that he did not such an act according to his covenant, the defendant saith that he offered to do it, and the plaintiff refused it; this is a departure, because the matter is not pursuant: for it is one thing to do a thing, and another to offer to do it, and the other refused to do it; therefore that should have been pleaded in the former plea." Co. Lit. 304.

[2] Plumb *v.* Taylor, 27 Ill. App. 238, *acc.*

to have been pleaded, or, otherwise, the Court cannot take notice of it; and, therefore, notwithstanding any thing that appears here to the contrary, the transfer might have been in any other place; and then a tender ought to have been made to the person. Sir *Bartholomew Shower* and Mr. *Northey* argued for the plaintiff; *Darnall* and *Wright,* king's serjeants, for the defendant.

Judgment for the defendant.

RIPLEY *v.* M'CLURE

In the Exchequer, July 6, 1849

[*Reported in* 4 *Exchequer Reports,* 345]

Assumpsit for breach by the defendant of his agreement to buy a third interest in a cargo of tea, though the plaintiff was ready to deliver it had not the defendant discharged him from so doing.

The defendant pleaded *inter alia* fraud of the plaintiff, a denial that he had discharged the plaintiff from delivering the tea, and that if he had done so he retracted and withdrew the discharge before the arrival of the vessel.

At the trial before Coleridge, J., at the Liverpool Spring Assizes, 1849, the following facts appeared in evidence: The plaintiff was a merchant carrying on business at Liverpool in his own name, and also with another person at Shanghæ, in China, as commission agents, under the firm of Thomas Ripley & Co. The defendant carried on business as a merchant and general commission agent at Belfast, under the firm of William M'Clure & Son. On the 20th of June, 1846, the plaintiff and defendant entered into a joint adventure for importing a cargo of tea from China, in which the defendant was to have one-third interest. An investment in goods was to be made to purchase the tea, which was to be brought by the ship Mary Ann Webb; and consigned to the defendant at Belfast for sale at the customary commission. On the 7th of October, 1846, the plaintiff wrote to the defendant, inclosing invoice of shipment to China, and stating "the proceeds to be invested in tea for the Belfast market, in which you are to take one-third interest." The plaintiff subsequently wrote to the defendant, representing that the adventure was likely to prove a loss, and offering to release him from his engagement. Some correspondence then took place, and ultimately this contract was annulled by mutual consent, and on the 16th of March, 1847, the agreement set out in the declaration was substituted. The defendant became dissatisfied with this agreement, and proposed to the plaintiff to cancel it, and set up the first contract. A long correspondence ensued, in which the defendant alleged that he had been induced to abandon the first contract and enter into the subsequent agreement by reason of the misrepresentations of the plaintiff.

On the 1st of July, 1847, the plaintiff sent to the defendant copies of the invoices of the tea, in a letter containing the following passage: "I have had it from yourself, that you do not intend to comply with the conditions of the contract for the purchase of one-third of this cargo, a threat which I am inclined to believe you do not intend to act upon. On this subject you will please give me your opinion in writing, and I shall be glad if you will assign your reasons for choosing such a course, when the contract on my part will be fulfilled to the letter." No answer having been returned to this letter, the plaintiff, on the 26th of August, again wrote to the defendant thus: "As regards the Mary Ann Webb, there is nothing left for me to do but to send her to some other port than Belfast, since you have declined to fulfill your contract." On the 30th, the defendant wrote in reply: "As to the cargo of the Mary Anne Webb, to one-third of which we still think we are entitled under our first contract, we observe you now intend to send it to a different port. I am willing, and, such being the case, I am glad this unpleasant matter should be thus ended; and I am willing to waive any claim I may have under either the first or second contract." In reply, the plaintiff wrote that it was not his intention to release the defendant from his contract of purchase. On the 1st of September, the defendant wrote to the plaintiff as follows: "I give you notice, that I am entitled to have these teas delivered at Belfast, either under the first or second contract, and that, if you fail to deliver them accordingly, I shall hold myself released from all contracts respecting them." On the 21st of September, the Mary Ann Webb arrived in Belfast Lough with the cargo of tea on board; and the defendant, having been informed of it, wrote to the plaintiff, stating that he was "willing to dispose of the cargo and appropriate the proceeds according to the interests of both parties therein." The defendant also on the same day served the captain of the vessel with a copy of this letter. In consequence, however, of directions from the plaintiff, the vessel sailed from Belfast on the 24th of September for London, without delivering any portion of her cargo to the defendant. The copy of the invoice sent to the defendant was headed thus: "Invoice of Congou tea shipped on board the Mary Ann Webb, Silk, master, for Belfast, and consigned to Thomas Ripley, Esq., Liverpool." It afterwards appeared that, in the heading of the original invoice, the words "on account and risk of Messrs. M'Clure & Son and Thomas Ripley" were inserted after the word "Belfast." The bills of lading stated that the goods were bound for Belfast market, and consigned unto Thomas Ripley or his assignee.

It was submitted, on the part of the plaintiff, that the above correspondence proved that the defendant had refused to perform the contract declared on, and had discharged the plaintiff from delivering the tea at Belfast. On behalf of the defendant it was contended, that he had not refused to perform the contract in question, and

that, so far from discharging the plaintiff from delivering the tea at Belfast, he had insisted on the plaintiff delivering it there.

The following questions were put by the learned judge, in writing, to the jury, who returned the accompanying answers: —

First, Was the plaintiff guilty of any misrepresentation as to the circumstances connected with the former contract, by which the defendant was induced to enter into the second? No.

Second, Did the defendant at any time refuse to perform the second contract? Yes, by implication.

Third, Did the defendant ever withdraw that refusal before the ship arrived at Belfast? No.

Fourth, Was the plaintiff willing to deliver, according to the second contract, down to the time of the defendant's refusal to perform the contract? Yes, but not after the arrival of the vessel at Belfast, the defendant having repudiated the contract.

Fifth, To and on whose account were the teas consigned? Thomas Ripley.

On these findings, the learned judge directed a verdict for the defendant on the issue raised by the fifth plea, and for the plaintiff on the other issues.

Knowles, in Easter Term last, obtained a rule on the part of the defendant for a new trial, on the ground of the verdict being against evidence, and also upon the following alleged grounds of misdirection: First, that the learned judge had told the jury, with reference to the letter of the first of July, in which the plaintiff demanded that the defendant should state in writing whether he intended to comply with the contract, that the plaintiff had a right to an answer from the defendant. Secondly, that the learned judge was wrong in putting the question to the jury whether the defendant at any time refused to perform his contract; but the question ought to have been, whether he did so refuse, after the arrival of the vessel at Belfast, and that the learned judge was not correct in directing a verdict to be entered for the plaintiff on the third issue, upon the answers which had been returned by the jury. Thirdly, that the mode in which the question was put to the jury, as to the consignment of the teas to the plaintiff was improper. A rule was also obtained to arrest the judgment, on the ground that the fifth plea was found for the defendant, and was a complete answer to the action.

In the Vacation Sittings, after the last Term (June 19 and 21), *Martin* and *J. Henderson* showed cause.

Knowles, Crompton, Unthank, and *Mellish,* in support of the rule.

The judgment of the Court was delivered by

Parke, B. A motion for a new trial was made in this case, on the ground of misdirection, and the verdict being against evidence. Also a motion to arrest the judgment, on the ground that the issue on the fifth plea was found for the defendant, and was an answer to the action. (After stating the pleadings, his lordship proceeded):

According to the statement of the contract in the declaration, and as it was proved, it was an executory contract to purchase one-third of a cargo of teas exported from China, capable of being ascertained, such purchase to be made on certain contingencies, viz., the arrival of the cargo at Belfast, the absence of previous contracts in China affecting the cargo, and other circumstances mentioned in the agreement. It is clear, therefore, that the property did not pass by the contract, and the delivery of the cargo by the plaintiff as vendor to the defendant as vendee, — not a mere readiness to deliver after arrival, — was a condition precedent to the plaintiff's right to recover the price, for that price was payable, not *on*, but *after* delivery. It also appeared on the trial, and is a most important element in the consideration of the case, and is a key to many ambiguous parts of the defendant's conduct in the transaction, that there had been before a contract of partnership in an outward adventure, and the cargo expected in return for it by the same vessel, for which the contract declared upon, being a contract of purchase and sale, was substituted. The liability to perform the contract of purchase and its non-performance, not that for a partnership in a joint adventure, was the question in the case. One defence was fraud in obtaining the second contract by false representations as to the probable result of the first, which defence was not made out. The other is the one with respect to which a misdirection is alleged to have taken place. This was in two particulars: the first was, that the question which the learned judge left to the jury, as to the non-performance of the contract, was, whether the defendant refused at any time to fulfil the second contract, not whether he refused after the arrival; and secondly, that, as to the question whether he refused or not, the learned judge told the jury that the plaintiff had a right, before the arrival of the cargo, to a distinct answer whether the defendant would fulfil the contract or not.

As to the latter point, if this had been laid down as a proposition of law, it would certainly not have been correct. The defendant was not bound to do anything before the arrival. But it was contended, that this was only an observation made by my brother Coleridge on the facts, and amounted merely to this, that, in the intercourse of merchants under the circumstances of the case, a letter from the plaintiff to the defendant, containing a request for such an answer, ought to have been answered; and we do not think that my brother Coleridge meant to say more, nor that the jury could have understood him to do so. The other objection requires more consideration.

It was contended, for the defendant, that to constitute a breach of the contract, a refusal at any time was insufficient; that it must be a refusal after the arrival of the cargo; and that the supposed refusal in July, to which the attention of the jury was said to have been directed, and which was long before the contract to buy became absolute, was no breach, and nothing more than an expression of an

intention to break the contract, not final, and capable of being retracted. And we think, that if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect. We think that point rightly decided in Phillpotts *v.* Evans.

But we cannot collect that the learned judge ever told the jury that a refusal at any time was a breach. He left the questions in writing, whether there was a refusal at any time, and whether that refusal had been subsequently retracted; and the jury having found, as we think they were warranted by the evidence to do, that it had not, there was certainly evidence of a continual refusal down to and inclusive of the time when the defendant was bound to receive, which would render the defendant liable, if all the conditions precedent had been performed or waived. But then it was said, and rightly, that the delivery of the cargo being a condition precedent, the plaintiff was bound to perform it, unless the defendant waived or discharged him from so doing. In the declaration there is an allegation, though informal, of such waiver or discharge, coupled with the allegation of refusal, and an issue upon it in the third plea, and the plaintiff no doubt was bound to prove that waiver or discharge: we do not feel any difficulty in saying that there was ample evidence of such waiver in the conversation referred to in the plaintiff's letter of the 1st of July, coupled with the whole tenor of the defendant's letters.

By an express refusal to comply with the conditions of the contract of purchase, the defendant must be understood to have said to the plaintiff, "You need not take the trouble to deliver the cargo to me when it arrives at Belfast, as purchaser, for I never will become such;" and this would be a waiver at that time of the delivery; and, if unretracted, would dispense with the actual delivery after arrival.

And if we look to the corespondence, it is to be inferred from it that the defendant never did mean to perform the contract of purchase at all; and, consequently, never retracted the waiver of the delivery by the plaintiff as a vendor. It is true that the defendant insists that the cargo shall be delivered at Belfast; and even the alleged parol refusal was probably not intended to be, as Mr. Mellish in his able and ingenious argument with truth contended, any waiver of the delivery at Belfast; it may be taken that the defendant always meant that; but the true question is not whether the delivery at Belfast was waived, but whether the delivery under the second contract, that is, the contract of purchase and sale, was waived; and we feel no doubt that the defendant, after he had formed the opinion that he had been deluded into a contract of purchase by false representations of the prospects of the original adventure in the first instance, wholly refused to be bound by the contract of sale, and thereby intended to waive the delivery under that contract, and never afterwards retracted the waiver.

This was a question for the jury; and we do not see any reason to think, from the report and the statements of the learned counsel on both sides, that the jury were not in substance properly directed as to the question for their decision; and we are all quite satisfied with their verdict. *Rule discharged.*[1]

ALBERT HOCHSTER *v.* EDGAR FREDERICK De la TOUR

In the Queen's Bench, June 25, 1852

[*Reported in* 2 *Ellis & Blackburn,* 678]

Declaration: "for that, heretofore, to wit, on 12th April, 1852, in consideration that plaintiff, at the request of defendant would agree with the defendant to enter into the service and employ of the defendant in capacity of a courier, on a certain day then to come, to wit, the 1st day of June, 1852, and to serve the defendant in that capacity, and travel with him on the continent of Europe as a courier for three months certain from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary, to wit," £10 per month of such service, "the defendant then agreed with the

[1] A portion of the opinion is omitted. The judgment of the Court was afterwards affirmed in the Exchequer Chamber. [5 Exch. 140.]

It is sometimes supposed that where one party to a contract makes a material breach thereof or repudiates his obligations, the other party must either continue performance or wholly rescind the contract, and thus lose all right to recover damages for the breach. But the great weight of authority is opposed to this conclusion. See 3 Williston Contracts, § 1303.

In Anvil Mining Co. *v.* Humble, 153 U. S. 540, 551, Brewer, J., in delivering the opinion of the Court said: "It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused."

In Daley *v.* People's Building Assoc., 178 Mass. 13, 18, Holmes, C. J., said: "Conduct going no further than the defendant's might not justify even a refusal of further performance on the other side, . . . a right which must not be confounded with rescission and which, in some cases, is more easily made out." See also Boston Co. *v.* Ansell, 39 Ch. D. 339, 365; Cherry Valley Iron Works *v.* Florence River Co., 64 Fed. Rep. (C. C. A.) 569; Hayes *v.* Nashville, 80 Fed. Rep. 641, 645.

plaintiff, and then promised him, that he, the defendant, would engage and employ the plaintiff in the capacity of a courier on and from the said 1st day of June, 1852, for three months" on these terms; "and to start on such travels with the plaintiff on the day and year last aforesaid, and to pay the plaintiff" on these terms. Averment that plaintiff, confiding in the said agreement and promise of the defendant, "agreed with the defendant" to fulfil these terms on his part, "and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid." That, "from the time of the making of said agreement of the said promise of the defendant until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated, and discharged the plaintiff from the performance of his agreement as hereinafter mentioned, he, the plaintiff, was always ready and willing to enter into the service and employ of the defendant, in the capacity aforesaid, on the said 1st June, 1852, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier for three months certain from the day and year last aforesaid, and to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid; and the plaintiff, but for the breach by the defendant of his said promise as hereinafter mentioned, would, on the said 1st June, 1852, have entered into the said service and employ of the defendant in the capacity and upon the terms and for the time aforesaid; of all which several premises the defendant always had notice and knowledge: yet the defendant, not regarding the said agreement, nor his said promise, afterwards and before the said 1st June, 1852, wrongfully wholly refused and declined to engage or employ the defendant in the capacity and for the purpose aforesaid, on or from the said 1st June, 1852, for three months, or on, from, or for, any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfil his said promise, and then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of the same agreement on his the plaintiff's part, and from being ready and willing to perform the same on the plaintiff's part; and the defendant then wrongfully wholly broke, put an end to, and determined his said promise and engagement," to the damage of the plaintiff. The writ was dated on the 22d of May, 1852.

Pleas: 1. That defendant did not agree or promise in manner, and form, &c.: conclusion to the country. Issue thereon.

2. That plaintiff did not agree with defendant in manner and form, &c.: conclusion to the country. Issue thereon.

3. That plaintiff was not ready and willing, nor did defendant

3. That plaintiff was not ready and willing, nor did defendant absolve, exonerate, or discharge plaintiff from being ready and willing, in manner and form, &c.: conclusion to the country. Issue thereon.

4. That defendant did not refuse or decline, nor wrongfully absolve, exonerate, or discharge, nor wrongfully break, put an end to, or determine, in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before Erle, J., at the London sittings in last Easter Term, it appeared that plaintiff was a courier, who in April, 1852, was engaged by defendant to accompany him on a tour, to commence on 1st June, 1852, on the terms mentioned in the declaration. On the 11th May, 1852, defendant wrote to plaintiff that he had changed his mind, and declined his services. He refused to make him any compensation. The action was commenced on 22d May. The plaintiff, between the commencement of the action and the 1st June, obtained an engagement with Lord Ashburton, on equally good terms, but not commencing till 4th July. The defendant's counsel objected that there could be no breach of the contract before the 1st of June. The learned judge was of a contrary opinion, but reserved leave to enter a nonsuit on this objection. The other questions were left to the jury, who found for plaintiff.

Hugh Hill, in the same term, obtained a rule nisi to enter a nonsuit, or arrest the judgment. In last Trinity Term.

Hannen showed cause.

Hugh Hill and *Deighton, contra.*

Lord Campbell, C. J., now delivered the judgment of the court: —

On this motion in arrest of judgment, the question arises whether if there be an engagement between A. and B., whereby B. engages to employ A. on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A. before the day to commence an action against B. to recover damages for breach of the agreement, A. having been ready and willing to perform it, till it was broken and renounced by B. The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement, before that day, to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. Short *v.* Stone, 8 Q. B. 358. If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to an-

other for the same term, he may be immediately sued for breaking the contract. Ford *v.* Tiley, 6 B. & C. 325. So if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. Bowdell *v.* Parsons, 10 East, 359. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day; but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the mean time by the contract, and that they impliedly promise that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in Elderton *v.* Emmens, 6 C. B. 160, which we have followed in subsequent cases in this court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the

contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consistent with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852: according to decided cases, the action might have been brought before the 1st June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case. Leigh *v.* Paterson, 8 Taunt. 540, only shows that, upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered. If this was a sale of specific goods, the action, according to Bowdell *v.* Parsons, 10 East, 359, might have been brought before that time, as soon as the vendor had sold and delivered them to another. Phillpotts *v.* Evans, 5 M. & W. 475, was a similar case; and the only question there was as to the mode of calculating the damages on a breach of contract for the sale and delivery of wheat, — the court very properly holding that the plaintiff was entitled to damages according to the state of the market when the wheat was to be delivered; the court professing to proceed upon the rule laid down in Startup *v.* Cortazzi, 2 C. M. & R. 165, where no question arose as

to the right to bring an action before the stipulated day of delivery on a renunciation of the contract. Parke, B., whose dicta are entitled to very great weight, certainly does say in Phillpotts *v.* Evans, 5 M. & W. 477, with reference to the notice by the defendants that they would not accept the corn: "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it." But the learned judge might suppose that the notice did not amount to a renunciation of the contract; and, if he thought that, after such a renunciation, the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract, we cannot agree with him. In Ripley *v.* M'Clure, 4 Exch. 345, it is said that, under a contract for the sale and delivery of goods, a refusal to receive them at any time before they ought to be delivered was not necessarily a breach of the contract; but the court intimated no opinion upon the question whether, there being a contract to do an act at a future day, if one party before the day renounces the contract, the other thereupon has a remedy for a breach of the contract. And they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done. The only other case cited in the argument which we think it necessary to notice is Planchè *v.* Colburn, 8 Bing. 14, which appears to be an authority for the plaintiff. There the defendants had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise; but, before he had completed it, and before the time when in the course of conducting the publication it would have appeared in print, the publication was abandoned. The plaintiff thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract, for want of having completed, tendered, and delivered the treatise, according to the contract. Tindal, C. J., said: "The fact was, that the defendants not only suspended, but actually put an end to, 'The Juvenile Library;' they had broken their contract with the plaintiff." The declaration contained counts for work and labor; but the plaintiff appears to have retained his verdict on the count framed on the special contract, thus showing that, in the opinion of the court, the plaintiff might treat the renunciation of the contract by the defendants as a breach, and maintain an action for that breach, without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it. If it should be held that, upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the mean time by the other, there seems

no reason for requiring that other to wait till the day arrives before seeking his remedy by action; and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a Court of Error. In the mean time we must give judgment for the plaintiff.

Judgment for plaintiff.[1]

FROST *v.* KNIGHT

IN THE EXCHEQUER CHAMBER, February 8, 1872

[*Reported in Law Reports 7 Exchequer,* 111]

COCKBURN, C. J. This case comes before us on error, brought on a judgment of the Court of Exchequer arresting the judgment in the action on a verdict given for the plaintiff.

The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule nisi was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which even no claim for performance could be made, and, consequently, till its occurrence, no action for breach of the contract be maintained. A rule nisi having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin, B., dissenting; and the question for us is, whether the judgment of the majority was right.

The cases of Lovelock *v.* Franklyn, 8 Q. B. 371, and Short *v.* Stone, 8 Q. B. 358, which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil it, an action will at once lie. The case of Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 445, upheld in this court in The Danube and Black Sea Co. *v.* Xenos, 13 C. B. (N. S.) 825, 31 L. J. (C. P.) 284, went further, and established that

[1] Frost *v.* Knight, L. R. 7 Ex. 111; Johnstone *v.* Milling, 16 Q. B. D. 460; Synge *v.* Synge (C. A.), [1894] 1 Q. B. 466; Roth *v.* Taysen, 73 L. T. 628, *acc.* See also, Danube, &c. Co. *v.* Xenos, 13 C. B. (N. S.) 825; Avery *v.* Bowden, 5 E. & B. 714; Reid *v.* Hoskins, 6 E. & B. 953; Roper *v.* Johnson, L. R. 8 C. P. 167; Brown *v.* Muller, L. R. 7 Ex. 319; *Re* South African Trust Co., 74 L. T. 769; Rhymney Ry. Co. *v.* Brecon Ry. Co., 69 L. J. Ch. 813; Honour *v.* Equitable Society, [1900] 1 Ch. 852; Smith *v.* Butler, [1900] 1 Q. B. 694; Michael *v.* Hart, [1902] 1 K. B. 482.

The English doctrine has been followed in Canada. Dalrymple *v.* Scott, 19 Ont. App. 477, 483; Cromwell *v.* Morris, 34 Dom. L. R. 305.

notice of an intended breach of contract to be performed *in futuro* had a like effect.

The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of Hochster *v.* De la Tour, and The Danube & Black Sea Co. *v.* Xenos, on the one hand, and Avery *v.* Bowden, 5 E. & B. 714, 26 L. J. (Q. B.) 3, Reid *v.* Hoskins, 6 E. & B. 953, 26 L. J. (Q. B.) 5, and Barwick *v.* Buba, 2 C. B. (N. S.) 563, 23 L. J. (C. P.) 280, on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

On the other hand, the promise may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of Phillpotts *v.* Evans, 5 M. & W. 475, and Ripley *v.* M'Clure, 4 Ex. at p. 359, we should have no difficulty in applying the principle of the decision in Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 445, to the present case, were it not for the difference which undoubtedly exists between that case and the present, viz., that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time of performance arrives; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise.

After full consideration we are of opinion that, notwithstanding

the distinguishing circumstance to which I have referred, this case falls within the principle of Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 455, and that, consequently, the present action is well brought.

The considerations on which the decision in Hochster *v.* De la Tour is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is — and the decision in Hochster *v.* De la Tour, proceeds on that assumption — a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled. must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus,* and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would

otherwise flow from the non-fulfilment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

It appears to us that the foregoing considerations apply to the cause of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are therefore of opinion that the principle of the decision of Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 455, is equally applicable to such a case as the present.

It is next to be observed that the law as settled by Hochster *v.* De la Tour and Danube and Black Sea Company *v.* Xenos, 13 C. B. (N. S.) 825, 31 L. J. (C. P.) 284, is obviously quite as applicable to a contract in which personal status or personal rights are involved as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman, more especially, it is all-important that the relation shall not be put an end to. Independently of the mental pain occasioned by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions; nor could she admit of such approaches, if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see, therefore, every reason for applying the principle of Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 455, to such a case, and for holding the contract, if repudiated, to be broken, not only in its present, but also in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggra-

vating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and therefore that, when by terms of the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that, consequently an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We think that, in estimating the amount of injury done and of the compensation to be made for it, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties and the then existing value of the marriage. It is, therefore, manifest that it is better for both parties — for the party intending to break the contract, as well as for the party wronged by the breach of it — that an express repudiation of the contract should be treated as a violation of it in all its incidents, and should give the right to the party wronged to bring an action at once, and have the damages assessed at the earliest moment. No one can doubt that, morally speaking, a party who determines to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention than if he keeps that intention secret till the time for fulfilling the promise has come. The reason is that the giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury to the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of Hochster *v.* De la Tour comes to be applied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of Short *v.* Stone, 8 Q. B. 358, to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from the application of the principle of Hochster *v.* De la Tour are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages.

We are struck by the fact that the Lord Chief Baron, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But as the rights and obligations of the parties arise here entirely out of the contract, we have a difficulty in seeing how such an action could be maintained. But be that as it may, as in such an action as is thus suggested the damages would have to

be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simpler course, the case being, as it seems to us for the reasons we have given, clearly within the decision in Hochster *v.* may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the non-fulfilment of the promise as though the death of the defendant's father — the event on which the fulfilment was to depend — had actually occurred.

We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.[1]

JOHNSTONE *v.* MILLING

IN THE QUEEN'S BENCH DIVISION COURT OF APPEAL, January 13, 1886

[*Reported in* 16 *Queen's Bench Division,* 460]

APPEAL from the order of the Queen's Bench Division directing that judgment should be entered for the defendant on the counter-claim for damages to be ascertained by a reference.

The defendant in the action set up a counter-claim for damages for breach of a covenant contained in a lease by which the plaintiff covenanted with the defendant to rebuild the demised premises. The reply stated, among other things, that the plaintiff had not received any notice to rebuild from the defendant as required by the terms of the covenant, and also that the lease was surrendered by the defendant before the time at which the obligation to rebuild would have arisen.

The action was, after issue joined, remitted to the county court for trial.

The facts with regard to the claim are immaterial to this report.

The facts with regard to the counter-claim as found by the county court judge were that the plaintiff had been unable to find the money to rebuild the premises; that the plaintiff both before and after the surrender of the lease told the defendant that he was unable and would be unable to find the money for rebuilding the premises; that the defendant in consequence of the plaintiff stating that he was and would be unable to find the money for rebuilding the premises surrendered the lease; and that the defendant suffered damage by such surrender. The defendant's counsel submitted on those findings that the defendant was entitled to a verdict on the counterclaim.

The county court judge, however, held the contrary, and found a verdict both on the claim and on the counter-claim for the plaintiff, and entered judgment accordingly.

[1] Kurtz *v.* Frank, 76 Ind. 594; Adams *v.* Byerly, 123 Ind. 368; Holloway *v.* Griffith, 32 Iowa, 409; Lewis *v.* Tapman, 90 Md. 294; Sheahan *v.* Barry, 27 Mich. 217; Burtis *v.* Thompson, 42 N. Y. 246; Brown *v.* Odill, 104 Tenn. 250; Burke *v.* Shaver, 92 Va. 345, *acc.* See also Trammell *v.* Vaughan, 158 Mo. 214; Stanford *v.* Mcgill, 6 N. Dak. 336; Swiger *v.* Hayman, 56 W. Va. 123.

A rule nisi for a new trial was obtained by the defendant in the Queen's Bench Division; and the Divisional Court (Huddleston, B., and Cave, J.), upon the argument of the rule, made the order against which the plaintiff appealed.

Foote, for the plaintiff.

Brooke Little, for the defendant.

Bowen, L. J. [opinions against the counterclaim having been given by Lord Esher, M. R. and by Cotton, L. J.,] I am of the same opinion. The question which we have to decide arises with regard to the defendant's counter-claim. The claim made by the defendant is upon a covenant by which the plantiff undertook, after the expiration of four years from the commencement of the term, to rebuild the premises upon notice from the defendant to do so. The defendant says that before the time had arrived for the performance by the plaintiff of this obligation he repudiated his liability on the contract, and so conferred an immediate right of action on the defendant. We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen,* and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Upon looking to the reason of the thing it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of the contract, and yet to treat the contract as still open and existing with regard to the future. Such being the reason of the thing, the authorities seem all to be the same way. In Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 455, Lord Campbell thus expresses the doctrine: "But it is surely much more rational and more for the benefit of both parties that, after the renunciation of the agreement

by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it." In the passage cited by my brother Cotton from Frost *v.* Knight, L. R. 7 Ex. 11, Cockburn, C. J., points out that there are these two alternatives open to the promisee, and that it is a condition essential to his right to sue upon a repudiation of the contract before the time for performance as upon a breach that he should thenceforth treat the contract as at an end except for the purpose of being sued upon. Such being the doctrine on the subject, the question arises whether it is applicable to the case of a lease. It has been decided in Surplice *v.* Farnsworth, 7 M. & G. 576, that a tenant could not throw up his tenancy on the breach of a stipulation that the landlord should put the premises in repair. No one ever yet heard of an attempt to put an end to a lease in respect of a breach of covenant except in cases where the term was made dependent upon the performance of the covenant as a condition. No case has been cited in which it has been sought to apply the doctrine of Hochster *v.* De la Tour, 2 E. & B. 678, 22 L. J. (Q. B.) 455, to such a case as this, or to any case where the promisee sought to keep open the contract after the alleged repudiation by the promisor, and also to sue for damages for such repudiation as for a breach. It is not necessary to decide the point, but I very much doubt whether the doctrine of Hochster *v.* De la Tour is applicable in such a case as this between lessor and lessee. Apart, however, from this question, I think that the court below were wrong with regard to the inferences of fact which they drew. The claim being for wrongful repudiation of the contract, it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract. It seems to me that the county court judge was of the contrary opinion, and, looking to the whole history of the transaction, I cannot say that he was wrong. Unless the language of the plaintiff can only reasonably be construed as importing such renunciation, I think the court below ought not to have disregarded the finding, and treated what the plaintiff said as amounting to a renunciation of the contract within the doctrine to which I have alluded. Further, assuming that there was evidence to support a finding that what the plaintiff said was a renunciation of the contract, there does not seem to me to be a tittle of evidence to show that the defendant ever elected to treat it as such, and all reason and authority, as I have said, appear to me to show that he must so elect to treat it, in order that it may constitute a breach of the contract. It appears to me, therefore, that the case for the defendant entirely fails. For these reasons I think that the appeal should be allowed. *Appeal allowed.*

DINGLEY AND ANOTHER *v.* OLER AND ANOTHER
OLER AND ANOTHER *v.* DINGLEY AND ANOTHER

SUPREME COURT OF THE UNITED STATES, March 8, 9–April 5, 1886

[*Reported in* 117 *United States,* 490]

THIS was an action of assumpsit brought by Dingley Brothers against W. M. Oler & Co., of Baltimore, to recover damages for the alleged breach of an agreement, whereby, it was averred, the defendants undertook and promised, in consideration of 3,245 25-100 tons of ice delivered to them by the plaintiffs in 1879, to return and deliver to the plaintiffs the same quantity of ice from the defendant's ice-houses in the year 1880.

The court made a special finding of the facts, and, in pursuance of the conclusions of law based thereon, rendered judgment in favor of the plaintiffs for the sum of $7,335.35.

Exceptions were taken by each party to rulings of the court, on which errors are assigned, the cause being brought here for review on writs of error sued out by the respective parties.

The court found, as matter of fact, that late in the season of 1879, the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec River and shipping it thence during the season, that is, while the river was open.

The offers of the plaintiffs were rejected, but the defendants, by their letter of Sept. 6, made a counter offer to take a cargo and "return the same to you next year from our houses." The plaintiffs, by their letter of September, 1879, accepted this offer, and several cargoes were delivered upon the same terms; the total delivery was 3,245 25-100 tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice, and he replied that he did not know about that, delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things, "we must, therefore, decline to ship the ice for you this season, and claim our right to pay you for the ice in cash at the price you offered other parties here (that is, fifty cents), or give you ice when the market reaches that point."

The plaintiffs, July 10, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery, to which the defendants answered, July 15, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation. The letter contained this sentence: "We cannot, therefore,

comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," &c., asking for a reply or a personal interview. Neither appears to have been given, and this action was commenced July 21, 1880. The court further found that ice was worth five dollars a ton in July, 1880, and fell later in the season to two dollars a ton.

Thereupon the court held, as matter of law, that there was a contract executed by the plaintiffs, and to be executed by the defendants, who were bound to deliver 3,245 25-100 tons of ice from their houses on the Kennebec River during the year of 1880; that the year meant the shipping season; and that the defendants had the whole season, if they chose to demand it, in which to make delivery, and that the letters of July 7 and 15 from the defendants to the plaintiffs contained an unequivocal refusal to deliver any ice during the season; that the defendants having unqualifiedly refused to ship the ice, this action could be maintained, though brought before the close of the season, but that the damages were not to be reckoned by the price of ice in July; that what the plaintiffs lost was 3,245 25-100 tons of ice some time during the season; that the price of ice went down after July to two dollars a ton, and the measure of damages must be reckoned at this rate, with interest from the date of the writ.

To these conclusions of law both parties excepted.

Mr. *Orville Dewey Baker,* for Dingley and another.

Mr. *Bernard Carter,* for Oler & Co.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court: —

We agree in opinion with the Circuit Court, that according to the terms of the contract, the defendants had the option of delivering the ice contracted for at any time during the whole shipping season of 1880, giving to the plaintiffs reasonable notice of the time when fixed, and an opportunity to prepare for receiving and taking it away from the defendants' houses. The language of the contract was that the defendants were to "return the same (the ice) to you next year from our houses." "Next year," it is not denied, means the shipping season of 1880, during which navigation was open, and in time for the plaintiffs, on notice, to obtain vessels, send them to the ice houses for loading, and get out of the river before it was closed to navigation. The defendants were to deliver, and although that, under the circumstances, required nothing on their part but to be ready for the plaintiffs to receive and load on their vessels, that state of readiness might depend upon other engagements of the defendants in respect to ice in the same houses, so that they had the right under the terms of the contract to consult their convenience as to the particular day when they would furnish to the plaintiffs the ice for shipment. The first and principal act to be done under the contract was to be done by the defendants, that is, the delivery, and the words of the agreement are fully satisfied when that is done

at any reasonable time within the season of 1880. And this confers upon the defendants, bound to make the delivery, the choice of the time within the period permitted by the contract. Wheeler *v.* New Brunswick & Canada Railroad Co., 115 U. S. 29.

We differ, however, from the opinion of the Circuit Court that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiffs a right of action before the expiration of the contract period for performance. We do not so construe the correspondence between the parties. In the letter of July 7 the defendants say: "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point." Although in this extract they decline to ship the ice that season, it is accompanied with the expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs. For, in their answer of July 10, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you (the defendants) will take a more favorable view upon further reflection," &c. Here certainly was a *locus penitentiæ* conceded to the defendants by the plaintiffs themselves, and a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. They accordingly say: "Now you ask us at a time when we are pressed by our sales, and by short supply threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair," &c. "We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the facts stated herein and in ours of the 7th." This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced, and claimed as a matter of law to follow, the defendants have a right to claim that their ex-

pressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in Hochster *v.* De la Tour, 2 E. & B. 678; Frost *v.* Knight, L. R. 7 Ex. 111; Danube & Black Sea Railway Co. *v.* Xenos, 11 C. B. (N. S.) 152, and which, in Roper *v.* Johnson, L. R. 8 C. P. 167, 178, was called a novel doctrine, followed by the courts of several of the States; Crabtree *v.* Messersmith, 19 Iowa, 179; Holloway *v.* Griffith, 32 Iowa, 409; Fox *v.* Kitton, 19 Ill. 519; Chamber of Commerce *v.* Sollitt, 43 Ill. 519; Dugan *v.* Anderson, 36 Md. 567; Burtis *v.* Thompson, 42 N. Y. 246,[1] but disputed and denied by the Supreme Judicial Court of Massachusetts in Daniels *v.* Newton, 114 Mass. 530, and never applied in this court. Accordingly, the right to maintain the present action was justified upon the principle supposed to be established by those cases.

The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule invoked.

In Smoot's case, 15 Wall. 36, this court quoted with approval the qualifications stated by Benjamin on Sale, 1st ed. 424, 2d ed. § 568, that "a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery *v.* Bowden, 5 E. & B. 714, s. c. 6 E. & 2. 953, which were held

[1] Now followed by the Federal Courts, Rochm *v.* Horst, 178 U. S. 1, Central Trust Co. *v.* Chicago Auditorium Assoc. 240 U. S. 581; Equitable Trust Co. *v.* Western Pac. R. Co. 244 Fed. 485, 250 Fed. 327 (C. C. A.) 246 U. S. 672; Grau *v.* Foss, &c. Co. *v.* Bullock, 59 Fed. Rep. 83, 87; Marks *v.* Van Eeghen, 85 Fed. Rep. (C. C. A.) 853. The Supreme Court long remained apparently undecided. Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255, 264; Pierce *v.* Tennessee, &c. R. R. Co., 173 U. S. 1, 12. See also Edward Hines Lumber Co. *v.* Alley, 73 Fed. Rep. (C. C. A.) 603.

The numerous decisions in state courts are collected in 3 Williston Contracts, § 1314. The ablest opinion in opposition to the prevailing view is that in Daniels *v.* Newton, 114 Mass. 530.

In Benecke *v.* Haebler, 38 N. Y. App. Div. 344, the Court refused to apply the doctrine of anticipatory breach to the case of a promissory note. See also Honour *v.* Equitable Soc. [1900] 1 Ch. 852; Greenway *v.* Gaither, Taney, 227; Flinn *v.* Mowry, 131 Cal. 481. In Rochm *v.* Horst, 178 U. S. 1, 17, FULLER, C. J., distinguished the case of a note on the ground that the doctrine of anticipatory breach only applies to contracts where there are mutual obligations. See also O'Neill *v.* Supreme Council, 70 N. J. L. 410.

not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone *v.* Milling, in the Court of Appeals, 16 Q. B. D. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not by itself amount to a breach of the contract, unless so acted upon and adopted by the other party.

The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the defendants; for what they said on July 15 amounted merely to a refusal to comply with the particular demand then made for an immediate delivery.

The judgment is accordingly reversed upon the writ of error sued out by the defendants below, and the cause remanded, with instructions to take further proceedings therein according to law; and upon the writ of error of plaintiffs below judgment will be given that they take nothing by their writ of error.

ISAAC PARKER *v.* ELECTA P. RUSSELL

SUPREME JUDICIAL COURT OF MASSACHUSETTS, May 24–June 28, 1882

[*Reported in* 133 *Massachusetts,* 74]

CONTRACT. The declaration alleged "that the defendant, in consideration of the conveyance by the plaintiff to the defendant of certain real estate in Deerfield, promised and agreed to support and maintain the plaintiff, furnishing him with all things necessary and convenient in sickness and in health, during the natural life of the plaintiff; that the defendant accepted said conveyance, and has occupied and used said estate, but has refused and neglected and still neglects and refuses to perform her said agreement." Writ dated Sept. 14, 1880. Trial in the Superior Court, before Bacon, J., who allowed a bill of exceptions, in substance as follows: —

The evidence tended to show that, in March, 1873, the defendant, for a good consideration, agreed to support the plaintiff during his life; that she did support him in her house from that time till about Oct. 1, 1878, when her house was destroyed by fire; and that since the fire the defendant had furnished no aid or support to the plaintiff.

The defendant requested the judge to rule that damages could only be recovered in this action for failure to furnish support to the plaintiff prior to the date of the writ; and that damages for such failure since the date of the writ must be sought in another action. The judge declined to so rule, and instructed the jury that if the defendant, for a period of about two years, neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the

plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support and full indemnity for his future support.

The defendant also requested the judge to rule that the plaintiff, under his declaration, could not recover damages for any period subsequent to the date of the writ; but the judge declined so to rule.

The jury returned a verdict for the plaintiff in the sum of $972.25; and found specially that the support of the plaintiff, under the terms of the contract, from the date of the fire to the date of the writ, was of the value of $377.40, and that the same from the date of the fire to the date of the trial was of the value of $473.60. In case the plaintiff should not be entitled to damages under the rule laid down by the judge, judgment was to be entered for the one sum or the other, as this court should determine the rule of damages to be. The defendant alleged exceptions.

F. L. Greene, for the defendant.

A. DeWolf, for the plaintiff.

FIELD, J. In an action for a breach of contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the date of the writ, and not up to the time when the verdict is rendered. Fay *v.* Guynon, 131 Mass. 31.

But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract. Amos *v.* Oakley, 131 Mass. 413; Schell *v.* Plumb, 55 N. Y. 592; Remelee *v.* Hall, 31 Vt. 582; Fales *v.* Hemenway, 64 Maine, 373; Sutherland *v.* Wyer, 67 Maine, 64; Lamoreaux *v.* Rolfe, 36 N. H. 33; Mullaly *v.* Austin, 97 Mass. 30; Howard *v.* Daly, 61 N. Y. 362.

Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract they include damages for not performing the contract in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind; and to hold

that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels *v.* Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

The cases cited by the defendant are not inconsistent with these views. In Pierce *v.* Woodward, 6 Pick. 206, the declaration was for a breach of a negative promise, namely, "not to set up the business of a grocer" within certain limits; and it was held that the damages could be assessed only to the date of the writ. The defendant might at any time, without the consent of the plaintiff, stop carrying on the business, when the plaintiff's damages would necessarily cease.

Powers *v.* Ware, 4 Pick. 106, was an action of covenant broken, brought by the overseers of the poor, under the St. of 1793, c. 59, § 5, for the breach of a covenant to maintain an apprentice under an indenture of apprenticeship. The court in the opinion speak of the common-law rule in assessing damages only to the date of the writ. But the statute under which the action was brought prevented the overseers from treating the contract as wholly at an end, because it gave the apprentice a right of action when the term is expired, "for damages for the causes aforesaid, other than such, if any, for which damages may have been recovered as aforesaid," that is, by the overseers.

Hambleton *v.* Veere, 2 Saund. 169, was an action on the case for enticing away an apprentice; and Ward *v.* Rich, 1 Vent. 103, was an action for abducting a wife; and neither throws much light on the rule of damages for breach of a contract.

Horn *v.* Chandler, 1 Mod. 271, was covenant broken upon an indenture of an infant apprentice, who under the custom of London had bound himself to serve the plaintiff for seven years; the declaration alleged a loss of service for the whole term, a part of which was unexpired; on demurrer to the plea, the declaration was held good, but it was said "that the plaintiff may take damages for the departure only, not the loss of service during the term; and then it will be well enough." But if this be law to-day in actions on indentures of apprenticeship, it must be remembered that they are peculiar contracts, in which the rights and obligations of the parties are often affected by statutory regulations, and in some cases they cannot be avoided or treated as at an end at the will of the parties.

In this case, the declaration alleges in effect a promise to support

the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at the end, and recover damages for the breach of the contract as a whole." We cannot say that this instruction was erroneous as applied to the facts in evidence in the cause, which are not set out.

The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us.

Judgment on the verdict for the larger sum.[1]

MARY F. GA NUN, *on Behalf of Herself and All Other Creditors of Jane M. Sands, Deceased,* APPELLANT, *v.* MARY E. PALMER, *Individually and as Executrix of Jane M. Sands, Deceased,* RESPONDENT

NEW YORK COURT OF APPEALS, June 8–October 3, 1911

[*Reported in* 202 *New York,* 483]

HAIGHT, J. This action was brought to recover $20,000. under a contract made in 1899, by which Jane M. Sands promised the plaintiff $70 a month during the promisor's life, and, at the time of the latter's death, $20,000, contained in the promisor's safety deposit box, in consideration of the plaintiff's promise to care for the said Jane M. Sands as long as she lived.

The trial judge found that the plaintiff in pursuance of this contract cared for Miss Sands until May 1900, when Miss Sands left her and moved to the defendant's residence with whom she entered into a similar oral contract, but with less compensation. She continued to reside there until her death on August 17, 1906, and left a will in which the defendant was made sole beneficiary and sole executrix. The plaintiff received the payment of $70 a month during the time

[1] Pierce *v.* Tennessee, &c. Co., 173 U. S. 1; *Re* Manhattan Ice Co., 114 Fed. Rep. 399; Northrop *v.* Mercantile Trust Co., 119 Fed. Rep. 969; Strauss *v.* Meertief, 64 Ala. 299; Howard Col. *v.* Turner, 71 Ala. 429; Ætna Life Ins. Co. *v.* Nexsen, 84 Ind. 347; Goldman *v.* Goldman, 51 La. Ann. 761; Sutherland *v.* Wyer, 67 Me. 64; Speirs *v.* Union Drop-Forge Co., 180 Mass. 87; Cutter *v.* Gillette, 163 Mass. 95; Girard *v.* Taggart, 5 S. & R. 19; King *v.* Steiren, 44 Pa. 99; Chamberlin *v.* Morgan, 68 Pa. 168; Beardsley *v.* Hall, 31 Vt. 582; Treat *v.* Hiles, 81 Wis. 280. See also Mayne on Damages, 6th ed.), 106 *et seq.*; Sutherland on Damages, §§ 108, 112, 113.

The contrary decisions of Lichtenstein *v.* Brooks, 75 Tex. 196, 198; Gordon *v.* Brewster, 7 Wis. 355 (*cmf.* Treat *v.* Hiles, 81 Wis. 280; Walsh *v.* Myers, 92 Wis. 397), are not to be supported. See also Salyers *v.* Smith, 67 Ark. 526.

of her care for Miss Sands, and the only issue presented is her right to $20,000. The action was brought on May 31, 1907. The trial court was of the opinion that there was a breach of the contract in its entirety at the time the defendant left the plaintiff's house, and that therefore, the Statute of Limitations barred the claim. In reaching this result the learned justice in his opinion refers to the case of Henry *v.* Rowell (31 Misc. Rep. 384; affirmed on the opinion below, 63 App. Div. 620) as an authority upon the subject, which he was bound to follow. That was an action on *quantum meruit* to recover for the value of twelve years' board and lodging furnished by the plaintiff to the decedent in her lifetime, under an agreement to board and lodge her in his household as long as she should live, she agreeing to leave him by will all of the property she should own at the time of her death. After receiving board and lodging from the plaintiff for twelve years the decedent left his abode and went elsewhere and lived for fourteen years thereafter, and then died leaving a will in which she disposed of her property to other persons. Subsequently that action was brought. In that case it was held that there was a breach of the contract at the time that the decedent left the plaintiff's residence, and that the Statute of Limitations commenced to run at that time; that there was but one cause of action available to the plaintiff, and that was for the value of the board and lodging furnished by him up to that time. In that case there was no agreement to pay a definite sum for board and lodging per month or by the year, the only agreement to pay therefor being the promise of the decedent to make a will giving the plaintiff all of her property. It is, therefore, apparent that but one cause of action existed in that case. But whether the court correctly held that the action could not be maintained after the testatrix's death by reason of the running of the statute, we now express no opinion.

The case we have now under review differs from the above case, for under the agreement the decedent promised to pay the plaintiff $70 a month for the support of the house, etc., that being a definite, fixed amount payable monthly, for which an action could have been maintained therefor at the end of each month. With reference to the other provision of the agreement, instead of the decedent promising to make a will giving the plaintiff all of her property, she agreed at her death that the plaintiff is to have the $20,000 in her safe deposit box; and instead of this action being brought for the value of services rendered on *quantum meruit*, it is brought upon the contract, the plaintiff claiming the stipulated sum expressed therein. It may be that but one cause of action exists in favor of the plaintiff for the breach of the $20,000 clause of the contract, and that such an action could have been maintained at the time the decedent left the plaintiff's house and went to reside elsewhere. But in view of the fact that the plaintiff might meet with misfortune, disabling her from carrying out her part of the contract to care for

the decedent "in sickness and in health as long as she lives," thus rendering the determination of the amount of her damages uncertain and difficult to prove, she saw fit to wait until the amount specified in the contract became due by the terms thereof. Did she have the right to do this? In answering this question we shall assume for the purposes of this review only, that the breach of the testatrix's contract was of such a character as to amount to a notice to the plaintiff that she would not carry out the provision with reference to the giving her $20,000 at the testatrix's decease, and that an action for damages could have been maintained immediately after such breach. The question thus arises as to whether the plaintiff was bound to treat the contract as broken and bring her action, or might she at her option treat the contract as still in force and wait until the sum specified became due under its terms?

In this case, as we have seen, the breach occurred after partial performance. This fact was deemed of importance in the case of Henry *v.* Rowell (*supra*), but we fail to see how it affects the right of the plaintiff to exercise her option. It is quite true that there is a distinction made in the authorities with reference to contracts which still are wholly executory and are to be performed in the future; but the distinction pertains to that which would constitute a breach of such contracts. Where the contract is wholly executory there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie. Whereas in a partially executed contract the breach may result from a failure to perform some of the provisions of the contract. But in either case, after a breach by one party, the rights of the other party and his remedies are the same as to the unexecuted provisions of the contract. (Howard *v.* Daly, 61 N. Y. 362.)

In the case of Heery *v.* Reed (80 Kans. 380) it was held that the fact that there was a renunciation of the contract by the decedent before his death did not compel plaintiff to end the contract relation. She was at liberty to keep the contract and await the time for final performance specified in the contract.

In the case of Foss-Schneider Brewing Co. *v.* Bullock (59 Fed. Rep. 83) TAFT, J., said: "It is true that, where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other contracting party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfilment of the contract by its terms; but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such, and consider the contract at an end."

In the case of Pakas *v.* Hollingshead (184 N. Y. 211) it was held that where the vendor of goods to be delivered and paid for on instal-

ments refuses to deliver an instalment, a breach of the entire contract is thereby established for which the vendee, if he so elects, may immediately recover all his damages; or he may wait until the expiration of the time for the delivery of all the goods and then recover. While CULLEN, Ch. J., filed a dissenting opinion in this case, he did not dissent as to so much of the decision as is stated above; but, on the contrary, expressly stated that the aggrieved party had the option to treat the contract as still continuing in force, notwithstanding the breach thereof by the other party.

A further citation of authority hardly seems necessary, for the general rule is that a right of action does not accrue upon a contract until it is executed, or payment thereunder becomes due by its terms, and the Statute of Limitations does not commence to run until that event happens. The right to bring an action previous to that event is exceptional, and is only permitted in cases of a breach of a contract by one of the parties which permits the aggrieved party, at his option, to maintain an action for such breach and recover the damages he has suffered on account thereof. In reaching this conclusion we have assumed, as above stated, that the breach was of such a character as to permit the bringing of an action for damages. We do not, however, wish to be understood as deciding that question, for the rule that renunciation of a continuous executory contract by one party before the day of performance giving the other the right to use at once for damages is usually applied only to contracts of a special character; and the question whether it applies to such a contract as we have under review we leave undetermined. (Kelly *v.* Security Mutual Life Ins. Co., 186 N. Y. 16; Adenaw *v.* Piffard, 202 N. Y. 122–129; 25 Cyc. 1074.)

We do not deem it our duty to undertake a construction of the contract at this time and determine whether it contains an absolute promise to pay a specified sum upon the death of the testatrix; or whether it be in the nature of a specific legacy, as defined in the case of Crawford *v.* McCarthy (159 N. Y. 514–519), or the intention of the parties with reference thereto. It appears that the testatrix, at the time of executing the instrument, was an aged maiden lady, possessed of a fortune sufficient for her necessities. It may be that her distant relatives were over anxious to possess the surplus which she might leave. But all of these questions are for the trial court and are not at this time properly before us for determination.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, VANN, WERNER, HISCOCK and COLLIN, JJ., concur. *Judgment reversed, etc.*[1]

[1] A portion of the opinion is omitted and the statement of facts abbreviated.

CLARK *v.* MARSIGLIA

New York Supreme Court, July, 1845

[*Reported in* 1 *Denio,* 317.]

Error from the New York Common Pleas. Marsiglia sued Clark in the court below in assumpsit, for work, labor, and materials, in cleaning, repairing, and improving sundry paintings belonging to the defendant. The defendant pleaded *non assumpsit.*

The plaintiff proved that a number of paintings were delivered to him by the defendant to clean and repair, at certain prices for each. They were delivered upon two occasions. As to the first parcel, for the repairing of which the price was seventy-five dollars, no defence was offered. In respect to the other, for which the plaintiff charged one hundred and fifty-six dollars, the defendant gave evidence tending to show that after the plaintiff had commenced work upon them, he desired him not to go on, as he had concluded not to have the work done. The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures, and claimed to recover for doing the whole, and for the materials furnished, insisting that the defendant had no right to countermand the order which he had given. The defendant's counsel requested the court to charge that he had the right to countermand his instructions for the work, and that the plaintiff could not recover for any work done after such countermand.

The court declined to charge as requested, but on the contrary, instructed the jury that inasmuch as the plaintiff had commenced the work before the order was revoked, he had a right to finish it, and to recover the whole value of his labor and for the materials furnished. The jury found their verdict accordingly, and the defendant's counsel excepted. Judgment was rendered upon the verdict.

C. P. Kirkland, for the plaintiff in error.

A. Taber, for the defendant in error.

Per Curiam. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the contract, and upon that point we express no opinion. The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make

the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer. The judgment must be reversed, and a *venire de novo* awarded. *Judgment reversed.*[1]

[1] "We think the learned circuit judge was right as to the rule of damages in this case. As said by the learned counsel for the appellant, the plaintiffs took no steps to perform the contract after they were notified by the defendant that he refused to perform it on his part. The rights of the parties under the contract were fixed at that time. Whatever the plaintiffs did with the logs after that was wholly immaterial to the defendant, except that the plaintiffs could not refuse to do anything more with the logs, and then charge the defendant in damages for their loss. That the profit which the plaintiffs could have made on the contract, if they had been permitted to perform the same, is the correct rule of damages, and the one most in accordance with equity, is apparent from many considerations. Suppose the defendant had notified the plaintiffs that he repudiated the contract before anything had been done under it. In such case could the plaintiffs have voluntarily gone on and got out the logs and converted them into money, and charged the defendant with the difference between the contract price and the price they sold them for? It seems to us they could not. Their loss in such case would necessarily be the price the defendant had agreed to pay for the lumber, less the cost of its production by the plaintiffs. Can they enhance such damage against the defendant by going on and manufacturing the lumber and selling it at a price which would not pay for the cost of such manufacture, and charge the loss to the defendant? We think not. In the case of the sale of merchandise the damages are limited by the difference in value of the articles sold and the price agreed to be paid therefor, and if the vendor retains the goods sold after the date of delivery fixed on, and afterwards sells the goods for less than they were worth at the time fixed for the delivery, he cannot charge such loss to the defaulting vendee. Chapman *v.* Ingram, 30 Wis. 290, 295." Cameron *v.* White, 74 Wis. 425, 431.

See many American decisions to the same effect collected in 3 Williston Contracts, § 1298.

ZUCK & HENRY *v.* McCLURE & CO

PENNSYLVANIA SUPREME COURT, October 13, 1881

[*Reported in* 98 *Pennsylvania State,* 541]

ASSUMPSIT by Zuck & Henry against G. T. Rafferty *et al.,* trading as McClure & Co. The action was brought Nov. 29, 1879, the writ served and narr. filed the same day, to recover $1,500 due plaintiffs for coke delivered to the defendants during the month of October, 1879, under a written contract. The fact of delivery and the price was not disputed.

On the trial, before Collier, J., the defendants claimed to set off damages sustained by them by reason of the failure of the plaintiffs to comply with a subsequent contract for the delivery of coke from and after Dec. 1, 1879, at a stipulated price. The last-mentioned contract was consummated by correspondence Nov. 11, 1879, performance to begin Dec. 1, 1879. The plaintiff objected to the admission of any evidence relating to the second contract, upon the ground that the time of its performance did not commence until after the bringing of this action, and that consequently damages arising from any breach thereof could not be set off in this action. The court, however, admitted the evidence, which showed the existence of said second contract, and notice given on Nov. 19, 1879, by plaintiffs to the defendants that they could not comply with the same, to which notice the defendants replied in the following letter: —

PITTSBURG, Dec. 4, 1879

Messrs. Zuck & Henry, Connellsville, Pa:

GENTS, — We beg to draw your attention to contract between us by which you agree to furnish us the product of the Eldorado Coke Works (forty ovens); also product of ovens that may be built during the continuance of the contract from Dec. 1, 1879, to May 31, 1880, inclusive, and to advise you that we have been and *are now prepared to receive the coke under said contract.* If shipments on our account are not *at once* commenced, we will go into the market and buy an equal amount of coke which you fail to deliver us, and will hold you responsible for any difference in price which we may have to pay, and will retain the balance which we now have in our hands to secure us against any loss or damage which we may sustain from your failure to comply with contract. Yours most respectfully,

McCLURE & Co.

The defendants then proved, under objection, the failure of the plaintiffs to deliver coke under the second contract, and the purchase by the defendants of coke in the market at an advanced price, where-

by they suffered damages largely exceeding in amount the plaintiff's claim, for which they asked a verdict and certificate in their favor against the plaintiffs.

The plaintiffs presented, *inter alia,* the following point: —

A notice of an intended breach of contract will operate as a breach only if accepted and acted upon by the other party, who may, if he pleases, disregard the notice and insist upon performance according to the contract, and if he does so insist upon performance, he cannot afterwards rely on such notice as a breach.

The defendants' letter of Dec. 4, 1879 (Exhibit 12), shows that defendants did insist upon performance by plaintiffs according to the contract. No cause of action therefore accrued to the defendants until after the suit was brought, and the defendants are not entitled to set off the damage in the action for that reason.

Answer: As a whole, this point is refused.

The court charged the jury, in substance, that the defendants were entitled to set off damages sustained by reason of the plaintiff's breach of the second contract, and that the damages were to be measured by the difference between the price at which the plaintiffs agreed to deliver the coke and the market price during the period of the contract.

The jury found a verdict for the defendants, and certified a balance in their favor of $36,150.12, and judgment was entered thereon. The plaintiff thereupon took this writ of error, assigning for error the refusal of the above point.

J. S. Cooke (*I. P. Hays.* with him), for the plaintiffs in error.

Welty McCullough, for the defendant in error.

Mr. Justice Paxson delivered the opinion of the court, Nov. 7, 1881.

This action was commenced in the court below on the 29th day of November, 1879, and was to recover about $1,500 for coke delivered by the plaintiffs to the defendants during the previous October. There was no serious dispute as to either the delivery of the coke or the amount; but the defendants set up as a defence the breach of a contract on the part of the plaintiffs for the future deliveries of coke. To state said contract briefly, the plaintiffs had agreed to sell and deliver to the defendants the entire product of their Eldorado works, comprising forty ovens, at a fixed price per ton, and also the product of all other ovens built by them during the continuance of the contract. This contract plainly appears by the correspondence between the parties, and was finally closed on Nov. 11, 1879. On the 19th of the same month the plaintiffs notified the defendants in writing that they would not deliver the coke. On the 4th of December, four days after the delivery was to have commenced under the contract, the defendants wrote to the plaintiffs as follows: "We beg to draw your attention to contract between us by which you agree to furnish us the product of the Eldorado Coke Works (forty ovens); also product of ovens that may be built during the continuance of the

contract from Dec. 1, 1879, to May 31, 1880, inclusive, and to advise you that we have been and are now prepared to receive the said coke under said contract. If shipments on our account are not at once commenced, we will go into the market and buy an equal amount of coke which you fail to deliver us, and will hold you responsible for any difference in price which we may have to pay, and will retain the balance which we now have in our hands to secure us against any loss or damage which we may sustain from your failure to comply with contract."

The defendants upon the trial below were allowed to set off their damages by reason of the breech of the above contract, and the jury found a verdict in their favor for $36,150. The single specification of error raises the question whether there was any breach at the time the suit was commenced.

A mere notice of an intended breach is not of itself a breach of the contract. It may become so if accepted and acted on by the other party. If the defendants had accepted the plaintiffs' notice of breach contained in their letter of November 19 and acted upon it, there would plainly have been a breach of the contract. The plaintiffs in such case could not have relieved themselves by commencing to deliver the coke on December 1, but must have been held to all the legal consequences of the breach. The defendants, however, on December 4, still insist upon compliance. They say "they are now prepared to receive said coke under said contract." This certainly kept the contract alive as to both parties. The plaintiffs could have gone on and delivered the coke on December 4, in which case there would have been no breach and no damages. The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due; but if not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance. Ripley *v.* McClure, 4 Ex. 345; Lake on the Law of Contracts, 873. The promisee may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. Leake on Contracts, *supra.*

It follows from the foregoing principles that on November 29 when the action was commenced below, there was no breach of the contract which the defendants could set up as a set-off to the plaintiffs' claim. Nor does it help the defendants that when the cause was tried

the breach was complete. The date of the commencement of the suit is the obvious test in such cases. Morrison *v.* Moreland, 15 S. & R. 61; Carpenter *v.* Butterfield, 3 Johns. Cases, 144.

There was error in not affirming the plaintiffs' eighth point.

Judgment reversed and a venire facias de novo awarded.[1]

[1] "The learned counsel for the plaintiff does not insist that the contract must necessarily be construed to authorize the plaintiff to continue his work until completion, in the spring and summer of 1878, irrespective of the consequences to the defendant, but that the question of the construction of the contract upon that point was wholly immaterial in determining the issues between the parties. He insists that the defendant, by his notice of March 30, 1878, put an end to the contract absolutely, without any reference to the time when the work should or might be done under the contract; that he did not forbid the plaintiff from going on and completing the work at that time but forbade his doing it at any time, either presently or at any future time; and that the defendant did not claim to stop the plaintiff in his work because he was doing it at an unseasonable time, and thereby unnecessarily damaging him in the enjoyment of his farm.

"There is great force in the argument, and if the defendant did forbid the plaintiff without cause to continue the work at that time or at any other time, and there was no withdrawal on his part from that position, it would be quite immaterial what the construction of the contract should be as to when the work could be lawfully done by the plaintiff. Looking alone at the written notice to quit, given by the defendant, bearing date March 30, 1878, the refusal of the defendant to permit the plaintiff to do any further work under the contract would be absolute; but there is evidence showing that the plaintiff did work after the notice to quit was given, with the consent of the defendant. The plaintiff admits this in his evidence, but he says that the defendant told him to quit when he had completed pulling certain stumps which had been theretofore marked for pulling by the plaintiff. It also appears that the defendant offered to show that after the written notice was given, and whilst plaintiff was still at work, he told him he did not intend to terminate the contract, but to stop his work until after he got his crops off, and that he could then go on and pull the remainder of the stumps, and that the plaintiff assented to that arrangement.

"The evidence offered on the part of the defendant we think should have been admitted, under the pleadings, as tending to show that, notwithstanding the written notice to quit was absolute and unqualified, still the plaintiff was informed before he quit work, and before he had suffered any injury from such notice, that it was not intended as an absolute refusal on the part of the defendant to prevent the plaintiff from performing the contract, and that he was at liberty to perform the same at a proper and seasonable time. This evidence was, it seems, ruled out because it was supposed not to be admissible under the pleadings. We think it was clearly admissible under the pleadings. The plaintiff alleges that the defendant had forbidden him absolutely, and without assigning any cause, from doing any further work under the contract, and sets out in his complaint the written notice of the defendant of March 30, 1878. The defendant, in his answer, does not deny that he gave the written notice as alleged in the complaint, but alleges 'that the plaintiff insisted upon going on and pulling the stumps at the time when the land was ordinarily used for sowing grain and for pasture, and during the season when the same was required for pasturing purposes and for sowing and raising grain thereon, contrary to the express agreement of the parties; and that, because plaintiff so insisted upon going on with the work, he forbade him, because the land was needed for the ordinary purposes of farming.' Under this state of the pleadings, we do not think the defendant was estopped from showing that he notified the plaintiff, after the giving of the written notice, of the reason why he gave the same, and that he did not mean by such notice to absolutely refuse to permit him to do the work at a proper season. Such explanation of the written notice, being given before the plaintiff had acted upon it and quit work, and before he had sustained any damage from such notice, was a withdrawal of the absolute notice to terminate the contract contained in the written notice; and thereafter the plaintiff would not be justified in abandoning the contract, relying upon such written notice as his justification therefor." Nilson *v.* Morse, 52 Wis. 240, 250. See also Perkins *v.* Frazier, 107 La. 390. Compare Ault *v.* Dustin, 100 Tenn. 366.

ROBERT RAYBURN AND FRED W. RAYBURN *v.* ANDREW W. COMSTOCK ET AL.

MICHIGAN SUPREME COURT, April 22, 23–May 2, 1890

[*Reported in* 80 *Michigan,* 488]

ERROR to Alpena. Simpson, J., presiding. Argued April 22 and 23, 1890. Decided May 2, 1890.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

Turnbull & Dafoe, for appellants.

Depew & Rutherford and *George H. Sleator,* for plaintiffs.

MORSE, J. The plaintiffs entered into a contract with defendants, Nov. 13, 1885, in which they agreed to go upon certain lands of defendants, and cut, haul, and deliver at the west branch of Hubbard Lake, upon what is known as the "Lockwood Landing," all the timber suitable for saw-logs, for the sum of $3 per 1,000 feet. From two to three millions of said timber was to be delivered each year until all was delivered. The timber was to be cut clear, and in a prudent manner, and all to be cut that was suitable for lumber or shingles. Said logs were to be well landed and on skids, and well rolled up. Supplies were to be furnished out of the store of defendants, and money provided to pay the employed by plaintiffs, April 1, 1886, and the balance, if any, to be paid June 1, 1886, for the logs cut and delivered the first winter. The timber put in the second year was to be paid for April 1 and June 1 of 1887, as above.

The plaintiffs went onto the job in the fall of 1885, and that winter cut and delivered about two million feet, and were paid for it according to contract. The plaintiffs claim that they faithfully performed their contract for the first year, and were always ready and willing to perform the whole contract, but that they were prevented from doing so by the defendants. They bring this suit, alleging a breach of the contract on the part of the defendants, and claiming damages for such breach. They also count upon an agreement with defendants in relation to picking up and gathering about 2,500,000 feet of saw-logs scattered around the shores of Hubbard Lake, and putting them in booms ready to be towed across said lake. They allege that defendants agreed to pay them ten cents per 1,000 feet for such picking up; that they have completed the work, and have not been paid. The declaration also contains a claim for $5,000, based upon the common counts in assumpsit. The plea is the general issue, with notice of recoupment.

Upon the first contract the testimony upon the part of the plaintiffs tended to show that the first year they performed their contract substantially, and that defendants settled up with them, finding no fault at any time with the manner of their performance; that

when they were ready to commence again, in the fall of 1886, and went to defendants for supplies, they were informed by one of the defendants, Andrew W. Comstock, that they could not cut another stick of timber upon the lands, — he calling up a clerk to witness that he forbade their going on with the job. They waited until about Dec. 1, 1886, when they took another job, upon which they lost money. There was left when they quit upon the contract about 4,000,000 feet of timber uncut. The defendants' measure showed 3,900,000. The plaintiffs testified that they could have put this timber in at $2 per 1,000, or at a profit of $1 per 1,000.

The defendants claim that plaintiffs did not properly perform their contract in the following respects: Did not bank all the logs upon the "Lockwood Landing;" did not cut the timber clean as they went; did not place all the logs on skids, and left over 3,000 logs in the woods, cut but not hauled, some being on skids and some on the ground; that, by reason of the timber not being cut clean, the fire got in and damaged it, and that the same fire burned up and destroyed a large number of the logs left in the woods, and damaged those that were not destroyed. The defendants denied that they ever refused to let the plaintiffs go on with the job, and testify that, Dec. 24, 1886, they served a written notice upon plaintiffs to proceed at once and complete their contract. The plaintiffs admit receiving this notice, but say that they did not recive it until they had taken the other job, and were, therefore, not in a condition to go on with it. The plaintiffs recovered a verdict of $1,560.

The defendants bring error, and claim, first, that, there being 4,000,000 feet of timber upon the lands after the first year's work, the plaintiffs could not have completed the job in less than two years more, as the contract did not authorize them to put in over 3,000,000 in any one year; that, as the defendants notified them in December, 1886, to go on with the job, the only damages they could recover would be what they suffered between the time they were forbidden to go on and the date they were notified to proceed; and that, under the most favorable view, they could only get damages for the expenses of one year's delay and the interest upon the profits of one year's work.

We think the court charged the jury correctly in this respect. He said, in substance, that when plaintiffs were notified to proceed with the contract, as no suit had been commenced at that time, it was their duty to go on with the contract, if they were in a situation to do so, and that, if the jury believed the testimony of the defendants, the plaintiffs were never prevented from going on with the job, they could not recover, in any event. This question was in dispute, and the jury evidently found with the plaintiffs.

The testimony shows that plaintiffs, when this notice was served, had taken another contract, which employed all their teams and means. Under their theory, that up to this time defendants had

forbidden their going on with the contract, it was too late for this notice to have any effect whatever upon the rights of the parties. Certainly the defendants could not refuse to furnish supplies, and forbid plaintiffs cutting any timber on the land, and wait until plaintiffs had taken another job, and then withdraw their refusal to permit plaintiffs to finish the contract, and, by a notice to them to go on and perform, force plaintiffs to proceed, or lose all claim for damages thereafter. The plaintiffs had a right to take the refusal as it was given, and to seek other employment upon the strength of it, and they were not obliged to break the other contract they had made in order to save their rights under this one with the defendants. In view of the fact that the defendants went on the premises themselves in the winter of 1886 and 1887, and took off 500,000 feet, and let the contract to take off the balance to one Mulvaney, in 1887, at $2.50 per 1,000 feet, we are satisfied that if it be true, as claimed by plaintiffs, that defendants refused to let them go on with the contract until they had taken another job for the winter of 1886 and 1887, plaintiffs were fully justified in treating the contract as broken by the defendants, and were authorized to recover damages for the breach of the same as if no notice to proceed had ever been served upon them.

The claim that the contract had not been fully performed by the plaintiffs the first year was, under the testimony, fairly submitted to the jury. There was a dispute as to the lines of what was known as the "Lockwood Landing." The plaintiffs' testimony showed that a few thousand feet were piled beyond what Comstock claimed to be the line of the landing, the plaintiffs supposing the line extended further up the creek. After Comstock pointed out the line, no more logs were banked above it. If the jury believed this, there was a substantial compliance with the contract in this respect.

Plaintiffs' testimony also showed the timber cut clean, and in a prudent manner. They admitted that a few logs were left in the woods, some of which were not skidded; but this was owing to the fact that the season broke up with a big rain-storm, which, with the piling of logs by defendants upon a pond that plaintiffs' road crossed, prevented their getting all the logs out. Plaintiffs' testimony showed that this piling of logs by the defendants upon this pond, along the sides of their road across it, not only prevented plaintiffs' getting out all the logs they cut, but also from cutting and hauling more. This was denied by defendants; but, if so found by the jury, it was a sufficient excuse for not banking all the logs cut.

The evidence upon all the points in which a non-performance of the contract was averred by defendants, coupled with the testimony of plaintiffs that defendants settled with and paid them for the first year's work without finding any fault whatever, and that they never complained of the contract being broken in any way by plaintiffs until they refused to permit further performance by plaintiffs in September, 1886, was sufficient to go to the jury, and was properly

submitted to them. They found against the defendants, and we are not prepared to say they were not warranted in so finding.

The true rule of damages was also laid down by the court. The plaintiffs testified that it cost them $2.10 per 1,000 to put in what they delivered the first year, and that, as part of the work, such as getting camps and roads in order, was done the first year, so as to cheapen the work on the job thereafter, they could have put the balance in for $2 per 1,000. They were therefore entitled, under their testimony, to $1 per 1,000 profit. They did not get 50 cents per 1,000, however, by the verdict; the jury, evidently taking into consideration the evidence upon the part of defendants, some of which tended to show that there would have been no profit. There is no reason shown in the record why the plaintiffs should not recover, upon a proper showing, the difference between the contract price and the cost of putting in the logs. There is no particular element of uncertainty regarding the profits the plaintiffs would have realized from the performance of the contract. See Goodrich *v.* Hubbard, 51 Mich. 70; Burrell *v.* Salt Co., 14 id. 34; Loud *v.* Campbell, 26 id. 239; Leonard *v.* Beaudry, 68 id. 312, 80 id. 163.

But the court committed error in relation to the picking up of the logs in Hubbard Lake. Both parties admitted that there was a contract in relation to this work, but differed as to the compensation to be paid therefor. The plaintiffs claim they were to have 10 cents extra per 1,000; and the defendants testify that they were to pay only 2 cents extra above the 25 cents for towing, and that they had settled with plaintiffs, and paid them in full upon that basis. Yet the circuit judge permitted evidence to be given that it was worth 50 cents per 1,000 to pick them up, and instructed the jury as follows: —

"The second element in this case is the question in regard to picking up these logs on Hubbard Lake. The plaintiffs claim that defendants agreed to give them 10 cents a thousand feet extra, over and above the 25 cents that they were to receive for towing. If there was a contract between the defendants and plaintiffs in this case, and they understood it, that the Rayburns were to receive 10 cents a thousand for picking up those logs, they were entitled to it, if there was such a contract, and it was understood by all the parties. There could not be any contract unless they did understand each other. But the defendants claim that the contract was different. The defendants claim that the plaintiffs agreed to pick them up for two cents extra. If that was the contract, and the parties understood it, then they were bound by that, because when they make their contracts they are bound by them. It does not make any difference how hard it is for one side or good for the other, when we enter into contracts; if we do enter into them, we are bound by them. So that here are two separate claims as to the contract, — one for two cents, and one for ten cents. You are to judge. You have heard the testimony as to

whether there was any contract at all, and if so, which of these parties is right. If it was for two cents per thousand feet, then the Rayburns will have to be satisfied with that; and it seems from the evidence that they have received that. If it was ten cents per thousand feet, then they are entitled to receive it; and, if they have not received it, then they are entitled to receive it at your hands in this suit. But, if you find that these parties did not agree on anything, or if they did talk about it, they were both mistaken when they quit, and their minds did not meet upon this question, then there was no contract at all, because it takes as many as two parties to make a contract, and their minds must meet. If you should find that there wasn't any contract, and the work was done, — and that is admitted, — in that case the Rayburns would be entitled to receive whatever in your judgment the work was reasonably worth; because when we work for a man, and there is no agreement as to what we shall receive, the law gives us what it is worth."

There was no ground in the evidence from which the jury might infer that there was no contract, — that the minds of the parties did not meet. There was undoubtedly a parol arrangement as to the picking up of these logs; and the only question for the jury to determine was the price to be paid for the work. There was no misunderstanding about it. Either the defendant agreed to pay ten cents or two cents. The burden of proof was upon plaintiffs to show that the price was ten cents. Failing in this, they could not recover, as they had been paid the two cents. As there is no way of ascertaining what conclusion the jury arrived at as to this matter, the judgment must be reversed and a new trial granted, with costs of this court to defendants.

The other justices concurred.

TRI-BULLION SMELTING & DEVELOPING CO. *v.* JACOBSEN

CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, May 9, 1916

[*Reported in* 233 *Federal Reporter,* 646]

THIS action was brought in the District Court of the United States for the Southern District of New York, by Ernest O. Jacobsen against Tri-Bullion Smelting & Development Co., for breach of a contract by which the Development Company was to sell, and Jacobsen to buy the output of zinc concentrates of the Development Company's plant for two years from Nov. 22, 1911. The agreement contained the following clause:

"Force Majeure. — Sellers will be relieved from delivering, and buyers from taking the concentrates in case of strikes, fires, wars, revolutions, accidents to machinery etc., etc., and in case of events of superior force of nature over which they have no control. . . ."

After a year and a half the Development Company closed its mines and ceased delivery, asserting it could no longer mine ore at a profit. Jacobsen in conversation protested against this attitude of the Development Company, and in several letters in July, 1913, demanded fulfilment of the contract, or, as he stated, he would enter the market and charge the defendant whatever difference he might be compelled to pay between the contract price and the market price.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge.

The theory of Tri-Bullion seems to be that because, in the letter of July 8th, Jacobsen urged Tri-Bullion to proceed to fulfil the contract, he was thereby precluded from bringing action for an anticipatory breach, but must perform all of the provisions of the contract called for on his part, one of which was to pay the amount thereafter due for ore theretofore delivered and that Jacobsen could sue only for failure to deliver any installment as the installment became due month by month.

(1) The question of fact in the trial court was whether Tri-Bullion had breached its contract. Both parties having moved for the direction of a verdict, and the court having directed a verdict in favor of plaintiff, that question is disposed of by the verdict, and what the verdict amounts to is a finding that Tri-Bullion broke its contract, and it matters not whether the breach was actual or anticipatory. Wilson *v.* Knowles, 213 Fed. 782, 130 C. C. A. 440; Reis *v.* Rosenfeld, 204 Fed. 282, 122 C. C. A. 480; United States *v.* Two Baskets, 205 Fed. 37, 123 C. C. A. 310; Allegheny Valley Brick Co. *v.* C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189.

(2) Viewed, however, as an anticipatory breach, the action of Jacobsen in writing the letter of July 8th, 1913, insisting that Tri-Bullion should carry out his contract, did not, in any manner, cure such anticipatory breach by Tri-Bullion. The persistent position of Tri-Bullion was that it was excused by the force majeure clause — an obvious pretense to avoid the obligations of a contract which had become unprofitable. Jacobsen's letter of July 8th as the District Judge said, "was an ordinary business letter in which the plaintiff said in substance: 'You ought to perform your contract, and I request you to do so; but, if you do not, I will enter the market, buy zinc concentrates, and hold you for the difference between the cost to me and the contract price.' "

Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out, failing which such other party states he will be compelled to purchase goods in a rising market. Roehm *v.* Horst, 178 U. S. 1,

20 Sup. Ct. 780, 44 L. Ed. 953; Marks *v.* Van Eeghen, 85 Fed. 853, 30 C. C. A. 208.

(3) It is claimed by Tri-Bullion that Jacobsen was first in default, for the reason that, several days after July 7th, Jacobsen, in the ordinary conduct of the contract, would have been indebted to Tri-Bullion in an amount of, in round numbers, less than $2,000 (or about $1,871.35), representing the price of five cars of zinc concentrates shipments. We think the question as to who was first in default was settled by the verdict; but, in any event, this claim was clearly an afterthought.

Jacobsen's responsibility was not questioned; he had already paid Tri-Bullion over $250,000 under the contract during a period when it was unprofitable to him; no demand was ever made for this — to them — trifling sum of less than $2,000, and the practice of the parties was that payment was made when convenient, and that was usually several days after the price had been fixed by the rather elaborate method for determining price provided for in the contract. If Tri-Bullion was guilty of anticipatory breach on July 7th, there was no obligation on Jacobsen's part to pay over this small amount of money to Tri-Bullion, and especially in the face of every reasonable expectation that Tri-Bullion would be called upon to respond in substantial damages to Jacobsen because of loss suffered by Jacobsen in a rising market. Sperry & Hutchinson Co. *v.* O'Neill-Adams Co., 185 Fed. 231, 107 C. C. A. 337; Whitcomb *v.* Shultz, 215 Fed. 75, 131 C. C. A. 383.

(4) The only other question in the case relates to the rule of damages which the District Judge applied. There was no market value for Kelly ore because the mine was closed, and the only substitute in the market was ore from the Joplin mines in Missouri. This ore was purchased by National Zinc Company under a business arrangement between it and Jacobsen. It is well settled that, where there is no market, the value may be otherwise determined by the price of the best substitute procurable. Benjamin on Sales (5th Ed.) page 987; Sedgwick on Damages (9th Ed.) § 734; Williston on Sales, § 599; Hinds *v.* Liddell, L. R. 10 Q. B. Div., 265; Gruen *v.* Ohl, 81 N. J. Law, 626, 80 Atl. 547; E. W. Bliss Co. *v.* Buffalo Tin Can Co., 131 Fed. 51, 65 C. C. A. 289. A proper rule of damages having been applied, the amount of the damages was a question of fact, disposed of by the verdict, and not reviewable in this court.

The judgment is affirmed, with costs.[1]

[1] An abbreviated statement of facts has been substituted for the statement in the opinion of the court.

THE CHICAGO WASHED COAL COMPANY, APPELLANT, *v.* R. C. WHITSETT ET AL., APPELLEES

ILLINOIS SUPREME COURT, April 19–June 7, 1917

[*Reported in* 278 *Illinois,* 623]

CRAIG, C. J. The appellant brought suit to recover damages for an alleged breach of contract to furnish it coal from December 28th, 1909, to March 30th, 1910. The contract was entered into December 24, 1909, and provided for the daily delivery of 150 tons of coal. Payment was to be made on or before the tenth day of each month for all shipments made the preceding month. The appellant failed to pay on or before January 10th, 1910, for coal received in December, and the appellees thereupon stopped delivery, the last delivery being made on January 9th. On January 15th, the appellant paid its account for coal delivered in December, and on January 17th wrote demanding continuance of shipments at the agreed daily rate. The appellees replied on January 18th, that they had cancelled the contract on the 11th inst, for breach of the provision as to payment. For shipments of coal made during January, prior to January 9th, the appellant subsequently failed and refused to pay on or before February 10th.

Appellees rely upon the failure of appellant to pay its December account on or before January 10th and their letter of January 17 notifying appellant of the cancellation of the contract as constituting a recission of the contract; also the failure of appellant to pay the January account on or before February 10th as such an abandonment of the contract as to preclude a recovery thereon by appellant at this time even if the prior rescission was wrongful, which they do not concede. Appellant insists that the acceptance of the payment for the December delivery on January 15th was a waiver of its failure to pay on or before the 10th of the month, and the letter notifying it of the cancellation of the contract was such a repudiation of the contract by appellees as to excuse appellant from a further performance of the contract on its part. Both the trial and Appellate Courts adopted the view of appellees, and we concur in their views. When appellees ceased to make deliveries on the contract after January 8th, 1910, and thereafter notified appellant the contract had been canceled, the contract was terminated for all purposes so far as appellees were concerned. Their repudiation of the agreement could not have been made more emphatic or complete. The acceptance of the payment for the past due account did not estop them from insisting upon a rescission of the contract, when they were, at the time of accepting such payment, refusing to further comply with such contract. They had the right to receive or accept payment for coal already delivered in any event, whether the contract was canceled or not. If appellant

deemed the contract still valid and binding it then had the right to treat the contract as terminated for all purposes and bring an action for its breach and for the damages which it had sustained by reason of non-performance or being prevented from performing the contract, or it had a right to treat the contract as subsisting and keep it alive for the benefit of both parties, keeping itself at all times ready, able and willing to perform its part of the contract and at the expiration of the term of the contracts sue for its damages sustained by reason of the wrongful non-performance by appellees, but it could not do both. (Lake Shore and Michigan Southern Railway Co. *v.* Richards, 152 Ill. 59.) If it elected to keep the contract alive and in force for the purpose of recovering damages for future profits it must do so for the benefit of both parties, and must both allege and prove performance of the contract upon its part or a legal excuse for its non-performance before there could be a recovery on the contract. (Lake Shore and Michigan Southern Railway Co. *v.* Richards, *supra;* Kadish *v.* Young, 108 Ill. 170.) In the present instance appellant did neither, although it evidently tried to do both. It treated the contract as subsisting in so far as its right to demand delivery of coal thereunder was concerned, and broken in so far as appellees' right to demand payment of the coal previously delivered was concerned. This was fatal to appellant's right of action on the contract. If it elected to keep the contract alive it must show performance on its part or legal excuse for its non-performance. In order to do this it was incumbent upon appellant to show payment for the coal previously delivered or an offer to do so, or set the same off against its damages on the contract and at the time and in the manner provided by such instrument. (Hess Co. *v.* Dawson, 149 Ill. 138.) This appellant failed to do, as the evidence shows conclusively it refused to pay for the coal delivered in January, prior to the cancellation of the contract, until suit was brought on the account and judgment rendered against it for the amount. Therefore the most that can be said for appellant's case is that its proofs show that both parties were in default. In this condition of the record there could be no recovery by either against the other on the contract. (Harber Bros. Co. *v.* Moffat Cycle Co. 151 Ill. 84.) In this respect appellant is very much in the same situation as the defendant in Purcell Co. *v.* Sage, 200 Ill. 342. In that case the contract provided for the sale and delivery of 1500 tons of anthracite coal in car lots, as required, from September 1, 1895, to September 1, 1896, all payments to be made the 10th of the month following shipment. For a time the coal delivered was paid for according to the terms of the contract. On March 10th, 1896, the buyer refused to pay for the February delivery and notified the seller it would not pay for such coal unless more coal was delivered. Thereupon, on the following day, the seller rescinded the contract, gave the buyer notice of such rescission, and later brought its action in assumpsit by reason of the coal de-

livered. The buyer then sought to recoup its damages alleged to have been sustained by reason of the seller's refusal to furnish more coal. We there said: "The appellant was not entitled to recoup damages for a breach of the contract unless it had performed its part of the contract or was ready and willing to do so at the time required, but by refusing to make payment when demanded on March 10th, 1896, it failed to perform its part of the contract. Before appellant could recoup for a breach of contract it was required to prove that it had performed the essential requirements of the contract or was ready and willing to do so. If appellant, after the making of the contract, had on the 10th day of each month paid, or offered to pay, for all coal delivered during the preceding month, and the appellees had failed on their part to deliver coal, then the appellant would have been in a position to recover damages for the failure of appellees to perform their contract. The record, however, shows a violation of the contract by the appellant in the manner above stated. (Harber Bros. Co. *v.* Moffat Cycle Co. 151 Ill. 84; Hess Co. *v.* Dawson, 149 id. 138.) In the latter case of Hess Co. *v.* Dawson, *supra,* it was held that a defendant, when sued for articles sold and delivered to him by the plaintiff, will not be entitled to recoup damages for a breach of the contract unless he, the defendant, has performed his part thereof or has been ready and willing to do so at the time required. It is also there held that where the purchaser of articles fails to pay for the same as he agreed to, the vendor may abandon the special contract and sue and recover in an action of assumpsit for the value of the articles sold and delivered to the defendant."

For the reason given, the judgment of the Appellate Court will be affirmed.[1] *Judgment affirmed.*

L. J. KADISH *v.* A. N. YOUNG

ILLINOIS SUPREME COURT, November 20, 1883

[*Reported in* 108 *Illinois,* 170]

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit, brought by A. N. Young and George Bullen, against L. J. Kadish and Charles Fleischman. A trial was had, resulting in a verdict and judgment of $20,000 damages against the defendants.

Mr. *John Woodbridge* and Mr. *Francis Lackner* for the appellant Kadish; Messrs. *Hoadley, Johnson & Colson,* for the appellant Fleischman.

[1] The statement of facts in the opinion of the court has been abbreviated.

Mr. William A. Montgomery, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the court:

This was assumpsit, by appellees, against appellants, to recover damages sustained by the breach of an alleged contract, whereby, on the 15th of December, 1880, appellees sold to appellants 100,000 bushels of No. 2 barley, at one dollar and twenty cents per bushel, to be delivered to appellants, and paid for by them, at such time during the month of January, 1881, as appellees should elect. Appellees tendered to appellants warehouse receipts for 100,000 bushels of No. 2 barley on the 12th of January, 1881, but appellants refused to receive the receipts and pay for the barley. Within a reasonable time thereafter appellees sold the barley upon the market, and having credited appellants with the proceeds thereof, they brought this suit, and on the trial in the circuit court they recovered the difference between the contract price and the value of the barley in the market on the day it was to have been delivered by the terms of the contract. Upon the trial appellants denied the making of the alleged contract, that they were partners, or that any purchase of the barley was made for their joint account; and they also contended, if a contract was shown, then that on the next day after it was made they gave notice to appellees that they did not consider themselves bound by the contract, and they would not comply with its terms, and evidence was given tending to sustain this contention.

The questions of fact contested upon the trial in the circuit court, and to some extent discussed in argument here, are, by the judgment of the Appellate Court, conclusively settled against appellants, and we are denied the power of inquiring whether they are rightly or wrongly settled. Bridge Co. *v.* Commissioners of Highways, 101 Ill. 519; Edgerton *v.* Weaver, 105 id. 43; Indianapolis and St. Louis R. R. Co., *v.* Morganstern, 106 id. 216; Missouri Furnace Co. *v.* Abend, 107 id. 44.

The questions of law to which our attention has been directed by the arguments of counsel, arise upon the rulings of the circuit judge in giving and refusing instructions. He thus ruled, among other things, that appellants, by giving notice to appellees on the next day after the making of the contract that they would not receive the barley and comply with the terms of the contract, did not create a breach of such contract which appellees were bound to regard, or impose upon them the legal obligation to resell the barley on the market, or make a forward contract for the purchase of other barley of like amount and time of delivery, within a reasonable time thereafter, and credit appellants with the amount of such sale, or give them the benefit of such forward contract, but that appellees had the legal right, notwithstanding such notice, to wait until the day for the delivery of the barley by the terms of the contract, and then, upon appellants' failure to receive and pay for it on its being tendered, to resell it on the market, and recover from appellants the

difference between the contract price of the barley and its market value on the day it was to have been delivered.

That in ordinary cases of contract of sale of personal property for future delivery, and failure to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, has been settled by previous decisions of this court (see McNaught *v.* Dodson, 49 Ill. 446, Larrabee *v.* Badger, 45 id. 440, and Saladin *v.* Mitchell, id 79), and is not contested by appellants' counsel. But their contention is, that in case of such contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract, as, by at once reselling the property on the market on account of the buyer, or making a forward contract for the purchase of other property of like amount and time of delivery, shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. If the buyer may thus create a breach of the contract without the consent of the seller, we doubt not the duty to sell (where the property is in the possession of the seller at the time), at least within a reasonable time after such breach, will result as a necessary consequence of the breach. When the breach occurs by a failure to accept and pay for property tendered pursuant to the terms of a contract at the day specified for its delivery, this is doubtless the duty of the seller, and no reason is now perceived why it should not equally result from any breach of the contract upon which the seller is legally bound to act.

But the well settled doctrine of the English courts is, that a buyer cannot thus create a breach of contract upon which the seller is bound to act. In Leigh *v.* Patterson, 8 Taunt. 540 (4 Eng. C. L. 267), Phillpotts *et al. v.* Evans, 5 M. & W. 475, Ripley *v.* McClure, 4 Exch. 359, and, it may be, also in other early cases, it was held a party to a contract to be performed in the future cannot, by merely giving notice to the opposite party that he will not perform his part of the contract, create a breach of the contract. Subsequently, however, in Cort *v.* Ambergate, Nottingham, &c. Ry. Co. 17 Q. B. 127, and more explicitly in Hochster *v.* De la Tour, 2 E. & B. 678, the doctrine was announced as not in conflict with previous decisions, that the party to whom notice is given in such cases will be justified in acting upon the notice, provided it is not withdrawn before he acts. Lord Campbell, C. J., in delivering his opinion in the latter case, and speaking for the court, used this language: "The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compen-

sation in damages by the man whom he has injured, and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer."

The leading text-writers who treat of this question follow the authority of these cases, and the rule they announce is thus expressed in Sedgwick on Damages, (6th ed.) 340, *284: "An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance by giving notice that he would not be ready to complete the agreement, and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts have justly denied the right of either party to rescind the agreement, and have adhered to the day of the breach as the period for estimating damages." To like effect see Chitty on Contracts, (11th Am. ed.) 1079; 2 Parsons on Contracts, (6th ed.) 676; Benjamin on Sales, (1st ed.) 559, (4th Am. ed.) 973; Addison on Contracts, *952; Wood's Mayne on Damages, 250, *150.

The question came before this court in Fox *v.* Kitton, 19 Ill. 519, whether, when a party agrees to do an act at a future day, and before the day arrives he declares he will not keep his contract or do the act, the other party may act on such declaration, and bring an action before the day arives; and it was held, on the authority of Phillpotts *v.* Evans, and Hochster *v.* De la Tour, *supra,* that he may; and in that case it is said, in the opinion of the court, that there is no conflict in the cases referred to by counsel in the discussion thereof, and to prove it, this language from the opinion of Parke, Baron, in Phillpotts *v.* Evans, is quoted: "The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime, and rescinds the contract." And it is then added: "This is in strict accordance with the principles recognized in the leading case relied on by the plaintiff, — Hochster *v.* De la Tour."

In McPherson *v.* Walker, 40 Ill. 371, the question before the court was, whether it was error to say in an instruction that where there is a contract for the sale of property to be delivered in the future, a tender or offer of the property by the seller on the day of delivery is excused by a previous notice of the buyer that he would not accept the property, and it was held that it was. In the opinion of the court it is said: "The rule is, if one bound to perform a future act, before the time for doing it declares his intention not to do it, this, of itself, is not breach of his contract; but if this declaration be not withdrawn, when the time arrives for the act to be done it constitutes a sufficient excuse for the default of the other party," — referring to 2 Parsons on Contracts, 188, Hochster *v.* De la Tour, *supra,* and Crist *v.* Armour, 34 Barb. 378.

In Chamber of Commerce *v.* Sollitt, 43 Ill. 519, the character of question is the same as in the two preceding cases to which we have just referred, and it was decided the same way. Cort *v.* Ambergate Ry. Co., *supra,* Hochster *v.* De la Tour, *supra,* and Fox v. Kitton, *supra,* are referred to as sustaining the decision.

In Cummings *v.* Tilton, 44 Ill. 173, one of the points decided was, if the party who is to receive informs the party who is to deliver that he cannot pay the money, the latter is excused from offering to deliver, — but there is no discussion of the question.

Follansbee *v.* Adams, 86 Ill. 13, involved the same question as that decided in Fox *v.* Kitton, supra, and on the authority of that case, and Chamber of Commerce *v.* Sollitt, *supra,* it was decided the same way.

While it is true that in none of these cases was the question whether one party to a contract may, by only a notice of his intention not to comply with its terms, create a breach of the contract, before the court, still, in all of them it is assumed that he cannot; for if he could, the questions they decide would have been immaterial, and the English cases which they profess to follow, as has been seen, expressly hold that he cannot.

But counsel insist this court has held the contrary in Gale *v.* Dean, 20 Ill. 320, and in Trustees *v.* Shaffer, 63 id. 244. This is a misapprehension. Neither case professes to discuss the question before us, and no notice is taken in either of the decisions or dicta to which we have above referred. In Gale *v.* Dean no time was fixed by the terms of the contract for its performance, and in view of this omission the court held it reasonable that after the lapse of a reasonable time either party might declare a breach of the contract, if not performed; and it was in reference to this omission and these reciprocal rights of the parties under the contract, solely, that the court used the language quoted and relied upon by counsel for appellants, namely, that "we do not think that Gale, when he found he could not perform, was absolutely at the mercy of Dean for the determination of the time when his liability should be fixed and the measure of that liability determined." It had not the slightest reference to the character of question now before us. In the other case (Trustees *v.* Shaffer), the time for the performance of the contract had arrived. There was no question in that respect. If the plaintiff was improperly discharged, there was a clear breach of the contract. There was no controversy in regard to the question whether one party to a contract to be performed in the future, can, by a mere notice in advance of the time of performance that he does not intend to perform, create a breach of the contract; nor was there any question as to what acts a party may be required to do in advance of a breach of contract to mitigate the damages of the adverse party, because of notice that there would be a breach by him. After breach of a contract, as before herein intimated, we do not, at present, question that it is

the duty of the party entitled to damages to do what he reasonably may, without prejudice to his rights, to lighten the burden falling on his adversary.

There is nothing in the more recent English cases, as we understand them, repugnant to those to which we have referred upon this question.

In Frost *v.* Knight, L. R. 7 Exch. 111 (1 Moak, 218), decided in the Exchequer Chamber in Ferbruary, 1872, the suit was for breach of a marriage contract, whereby the defendant had promised to marry the plaintiff upon the death of his father, but the father still living, the defendant had announced his intention of not fulfilling his promise on his father's death, and broke off the engagement. Cockburn, C. J., in delivering the opinion of the court, thus states the law, after referring to the previous decisions: "The promisee, if he pleases, may treat the notice of intention" (*i. e.* not to perform the contract) "as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the proper time, subject, however, to abatement in respect of any circumstance which may have afforded him the means of mitigating his loss." This was followed, and its doctrine reiterated, in Brown *v.* Miller, L. R. 7 Exch. 319 (3 Moak, 429), decided in the Court of Exchequer in June, 1872, and Roper *v.* Johnson, L. R. 8 C. P. 167 (4 Moak, 397), decided in the Common Pleas in February, 1873.

Counsel for appellants refer to the fact that Keating, J., in Roper *v.* Johnson, says: "If there had been any fall in the market, or any other circumstances calculated to diminish the loss, it would be for defendant to show it," — and then cites with approval from the opinion of Cockburn, C. J., in Frost *v.* Knight, *supra*, to the effect that "the damages are subject to abatement in respect of any circumstances which would entitle him to a mitigation," etc., and insist they recognize the duty, here, of appellees, upon receiving notice, etc., to have sold upon the market or have entered into another contract for January delivery, etc. It is enough to observe, in answer to this, that in both Frost *v.* Knight and Roper *v.* Johnson, *supra*, the notice that defendant would not comply with the contract was

accepted and acted upon by the plaintiff as a breach of the contract; and so what was said in respect of the duty of the plaintiff to mitigate damages was said with reference to a case wherein he recognized the contract as having been broken by the notice of the adverse party, and with reference to what was to be done by him upon and after the recognition of that breach, and hence can have no application here. If a party is not compelled to accept the declarations of the other party to a contract that he will not perform it, as a breach, it must logically follow that he is under no obligation to regard that declaration for any purpose; for, as we have seen, the theory in such case, as laid down by Cockburn, C. J., in Frost *v.* Knight, *supra,* is: "He keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January.

We have been referred to Dillon *v.* Anderson, 43 N. Y. 231, Danforth *et al. v.* Walker, 37 Vt. 240 (and same case again in 40 Vt. 357), and Collins *v.* Delaporte, 115 Mass. 159, as recognizing the right of either party to a contract to create a breach of it obligatory upon the other party, by giving notice, in advance of the time for the commencement of the performance of the contract, that he will not comply with its terms. An examination of the cases will disclose that they do not go so far, but that they are entirely in harmony with what we have heretofore indicated is our opinion in respect of the law applicable to the present question.

In Dillon *v.* Anderson, the action was for a breach of contract for the construction of a pair of boilers for a steamboat. After work had been commenced under the contract, and a certain amount of material had been purchased therefor by the plaintiff, notice was given by the defendant to stop work, that the contract was rescinded

by the defendant, and that he would make the plaintiff whole for any loss he might suffer. The court held that it was the duty of the plaintiff, as soon as he received the notice, to have so acted as to save the defendant from further damage, so far as it was in his power.

In Danforth *et al. v.* Walker, 37 and 40 Vt., the defendant made a contract with the plaintiffs to purchase of them five car-loads of potatoes, being fifteen hundred bushels, to be delivered at a designated place as soon as the defendant should call for them, and as soon as he could get them away, some time during the winter. Soon after the first car-load was taken, potatoes fell in the market, and the defendant thereupon wrote the plaintiffs not to purchase any more potatoes until they should hear from him. The court held this created a breach of the contract, and that plaintiffs were not authorized to purchase any more potatoes, on account of the defendant after they received the notice. The court, in the case in 37 Vt., on page 244, use this language: "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such increased damages of the other party." And this same rule, upon the authority of these cases, is laid down in 2 Sutherland on Damages, 361.

The points in issue in Collins *v.* Delaporte are not pertinent to the present question, but in the opinion the court quotes the rule as above laid down, upon the authority of Danforth *et al. v.* Walker, and other cases.

It will be observed that in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it, as it was said in Frost *v.* Knight, *supra*, the defendant was, in case of notice, not to perform a contract the time of the performance of which is to commence in the future. In these cases there is no time or opportunity for repentence or change of mind, — in those there was. That it was not intended, by these cases, to trench upon the doctrine of Leigh *v.* Patterson, Phillpotts *v.* Evans, and other cases of like character, is manifest from the fact that they make no reference to those cases, or to the rule they announce; and in Collins *v.* Delaporte, no reference is made to Daniels *v.* Newton, reported in the next preceding volume (114 Mass. 530), wherein that court refused to follow the modification made in Hochster *v.* De la Tour, and Frost *v.* Knight, of the rule recognized by the preceding English decisions, but held that an action for the breach of a written agree-

ment to purchase land, brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal, on the defendant's part, ever to purchase. It follows that, in our opinion, the ruling on the point in question was free of substantial objection.

Objection is urged because the circuit judge gave an instruction, at the instance of appellees, with reference to the obligations and duties of the parties under the alleged contract of sale, in which no mention is made of a custom affecting those obligations and duties, of which custom proof was introduced on the trial. The existence of this custom was not conceded. Appellants claimed its existence, and appellees denied it. There was evidence both ways. This instruction presented the law correctly upon appellees' theory of the case, and the seventh instruction, given at the instance of appellants, presented the law, — including the hypothesis of a custom being proved, — upon the theory of the case. There is no repugnance between them. Each simply presents a different theory of the case, having evidence tending to sustain it, — and in this there is no error. City of Chicago *v.* Schmidt, Admx. 107 Ill. 186; Illinois Central R. R. Co. *v.* Swearingen,, 47 id. 206.

There was proof, upon the trial, tending to show that although appellees owned and had in their possession, at the time of the making of the alleged contract, an amount and kind of barley equal to or greater than that professed thereby to be sold, yet that they then only had of the warehouse receipts, which they actually tendered to appellants in January, those for 48,500 bushels, and that they subsequently obtained from Huck & Lefens the warehouse receipts for the remaining 51,500 bushels, upon a contract, whereby appellees agreed to pay Huck & Lefens therefor, at all events, one dollar per bushel, and one dollar and twenty cents per bushel if appellees shall recover from appellants in this suit. The court, in giving and refusing instructions, ruled that this in no wise concerned appellants, — that if the facts were as claimed, it did not make Huck & Lefens necessary parties to the suit, nor entitle appellants to any reduction in the measure of damages. In this there was surely no error. Huck & Lefens have no privity of contract with appellants, and whether appellees pay much or little for the barley with which to comply with their contract, cannot concern appellants. It was sufficient they owned and tendered the barley at the appointed time. If it had been given them, their measure of damages must be precisely the same as it would be had they paid ten-fold more than it was worth. The only effect of the transactions by which they obtained the barley is to vest title in them, and when it was thus vested it was absolutely theirs to do with as they pleased. No court, so far as our researches have enabled us to know, ever held that the price paid by the seller for an article sold and contracted to be delivered in the future, was a circumstance to be taken into consideration by the jury in deter-

mining the amount of damages the seller is entitled to recover upon the buyer's refusing to receive and pay for the property, and the distinguished counsel representing appellants have been unable to refer us to any such decision.

Objection is also taken to the language of the instruction with reference to the joint liability of appellants. The language of the instruction is objectionable, but, in our opinion, it is not possible that it could have misled the jury. The question was put in issue whether appellants were partners in the transaction, by proper pleadings. Evidence was introduced by each party on that question. There was not a particle of evidence tending to show that appellants were jointly interested in the transaction, if interested at all, otherwise than as partners. If the evidence in behalf of appellees prevailed, appellants were partners in the transaction; if that in behalf of appellants prevailed, they were not.

Upon the whole, we perceive no error of law in the rulings below. The judgment is therefore affirmed. *Judgment affirmed.*

BORROWMAN, PHILLIPS & CO. *v.* FREE & HOLLIS

In the Queen's Bench Division, Court of Appeal, November 25, 1878

[*Reported in* 4 *Queen's Bench Division,* 500]

Action for damages for not accepting any paying for a cargo of maize.

The plaintiffs sued upon a contract the benefit of which, with all rights under it, had been assigned to them; the following were the material portions: —

London, May 7th, 1877

"Sold to Messrs. Free & Hollis a cargo of mixed American maize . . . say three to four thousand quarters of 480 lbs., as per bill of lading, to be dated between the 15th of May and 30th of June, inclusive, at the price of thirty shillings and sixpence per 480 lbs. Payment by cash in London in exchange for shipping documents . . . or by the buyer's acceptances at sixty days' sight from date of arrival of bill of lading in London, with shipping documents attached, as usual. Sellers to render invoice within seven days of arrival of bill of lading in England."

The contract contained a clause providing that any dispute should be referred to arbitration.

At the trial before Denman, J., it was proved that the plaintiffs offered to the defendants a cargo to arrive by a vessel called the *Charles Platt*, and stated that they had not then received the shipping documents. The defendants refused to take this cargo, on the

ground that the shipping documents had not arrived; the plaintiffs, however, persisted in their offer. Under the provision in the contract this dispute was referred to arbitration, and the arbitrator decided that the defendants were not bound to accept the cargo of the *Charles Platt* in performance of the contract. The plaintiffs afterwards, on the 9th of July, offered the cargo of a vessel called the *Maria D.*, stating in their letter, "bill of lading to hand to-day, and dated about the 24th of June," and asking the defendants which of the modes of payment provided in the contract they preferred. The defendants refused to accept the cargo of the *Maria D.*, on the ground that they were not bound to accept any cargo in substitution for that of the *Charles Platt*, the offer of which the arbitrator had decided to be invalid. The plaintiffs did not, in point of fact, receive the shipping documents of the *Maria D.* until the 4th of August, and there was some evidence that on the 9th of July her cargo did not belong to them. The plaintiffs having sustained a loss upon the sale of the cargo, sued the defendants to indemnify themselves against it.

The defendants contended that there had been no valid tender of the cargo of the *Maria D.*, inasmuch as the shipping documents were not tendered at the same time. The plaintiffs alleged that the tender had been waived. DENMAN, J., found for the plaintiffs upon the question of waiver; but he gave judgment for the defendants on the ground that the plaintiffs had appropriated the cargo of the *Charles Platt* in satisfaction of the contract, and that after the arbitrator had decided that the defendants were not bound to accept it, the plaintiffs could not lawfully tender the cargo of any other vessel.

The plaintiffs appealed.

November 23, 25. *Herschell, Q. C.*, and *A. L. Smith*, for the plaintiffs.

Benjamin, Q. C., *Philbrick, Q. C.*, and *Reginald Brown*, for the defendants.

The arguments are sufficiently noticed in the judgments.

Brown *v.* Royal Insurance Co.[1] was cited as to the effect of an election made in pursuance of a contract.

BRAMWELL, L. J.[2] I think that this judgment cannot be supported. I will deal first with the second point, which has been made before us on behalf of the defendants, namely, that the plaintiffs were not in a condition to tender the cargo of the *Maria D.*, because it did not then belong to them. I think that this point was not taken at the trial, and if it had been the plaintiffs would have been able to meet it. I think that that is clear upon the construction of the documents and upon the facts before the Court. All that the sellers were bound to do under the contract of sale was to name the ship and to send on the invoice within the proper time. This they did, and the buyers were then to declare their option as to the mode of payment. It was

[1] 1 E. & E. 853; 28 L. J. (Q. B.) 275.

[2] BRETT, L. J., and COTTON, L. J., delivered concurring opinions.

contended at the trial that the tender was insufficient, because it was not accompanied with the shipping documents of the *Maria D.* I think it clear that it was unnecessary that at the time of the tender the sellers should have them in their possession. The performance of the contract does not depend upon that circumstance. As I have already said, before us the contention has been urged that the cargo of the *Maria D.* was not the plaintiffs'. Now, I quite allow that although a contention is not formally made at the trial, yet if it is obvious upon the face of the evidence it may be urged before us when the case is considered in all its aspects. This objection, however, is of a doubtful nature. Moreover, the plaintiffs might have met it by evidence that they had previously bought it; but, even if they had not bought it, the objection seems to me unsustainable; it is quite competent for a man to sell what does not belong to him: before the time for performance he may have bought it or procured the assignment of it, and be ready to fulfil his contract. The contention for the defendants is not maintainable either in the shape taken at the trial or in the form urged before us.

As to the main point in the case I cannot agree with the view of DENMAN, J. In due course after the contract had been entered into the *Charles Platt* arrived, but the shipping documents had not reached the plaintiffs when they offered her cargo to the defendants. The latter objected that under the contract they were not bound to take it without the shipping documents. This objection was not allowed by the plaintiffs, and the question was referred to arbitration. The arbitrator was of opinion that the plaintiffs could not insist upon the tender. It is unnecessary to express any opinion as to the decision of the arbitrator. The plaintiffs then offered a second ship, the *Maria D.*, within the time limited by the contract. It has been argued that by the tender of the *Charles Platt* the option of the plaintiffs was determined, and that the position of the parties is the same as if the *Charles Platt* had been named in the contract, and that no other ship could be declared. I do not think this argument maintainable. Suppose that a clause had been inserted, that no ship was to be declared whose shipping documents had not then arrived in England. A clause of that kind would be repugnant to the theory that the contract is to be treated as if the *Charles Platt* had been the ship named in it. The case may be shortly stated as follows: if the *Charles Platt* was a proper ship, the plaintiffs were entitled to tender her cargo; if she was not, they were entitled to withdraw the tender, and instead of the cargo of the *Charles Platt* to offer that of the *Maria D.* The defendants have relied upon *Gath v. Lees*,[1] but the decision is distinguishable. In that case cotton was "to be delivered at seller's option in August or September, 1864." The seller elected to exercise that option in August, and notice that it would be so exercised was accepted by the buyers. The seller had

[1] 3 H. & C. 558.

a right to exercise that option; but in this case, upon the defendants' hypothesis, the plaintiffs by naming the *Charles Platt*, exercised their option in an improper manner; therefore they had a right to withdraw their tender, and to exercise it in a proper manner. That case shows that this action is maintainable. The judgment of DENMAN, J., must be reversed.[2]

GRAY *v.* SMITH ET AL

CIRCUIT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, August 10, 1896

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, October 4, 1897

[*Reported in* 76 *Federal Reporter,* 525, *and* 83 *Federal Reporter,* 824]

THIS was an action for damages for breach of contract brought against the executors of Edgar Mills. A jury trial was waived and the Court found the following facts. On September 16, 1891, Edgar Mills made to the plaintiff a written offer to buy a lot on Market Street, San Francisco, for $240,000, $125,000 payable in cash and the remainder in several specified tracts of land. The offer by its terms was to hold good for three weeks. On October 6, 1891, the plaintiff accepted in writing the offer. The title to the lot on Market Street was at the time and throughout the time covered by the dealings of the parties with each other in Joseph A. Donohoe, Sr. On September 4, 1891, the plaintiff and one J. H. Cavanaugh had agreed with one another to share equally any commission or profit which could be obtained from the sale of this lot. On September 18, Cavanaugh began negotiations to buy the lot, and on October 7, Joseph A. Donohoe, Jr., executed as agent for his father a writing by which he agreed to sell to Edgar Mills the lot for $165,000 and a portion of the taxes payable on delivery of deed after examination of title, say fifteen days from date. On October 8, Edgar Mills was first informed that the title of the lot was in Donohoe and that the agreement to sell it to him, Mills, had been executed. Mills never accepted the offer of Donohoe, and neither Mills, Cavanaugh, nor the plaintiff, Gray,

[1] Ashmore *v.* Cox, [1899] 1 Q. B. 436, 440, *acc.* Compare Kurtz *v.* Frank, 76 Ind. 594; Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143; Bell *v.* Hoffman, 92 N. C. 273; Ault *v.* Dustin, 100 Tenn. 366.

In Rose *v.* Hawley, 133 N. Y. 315, 320, the court said: "Let us suppose a suit on a contract in which the plaintiff recovers, but on appeal to the General Term the judgment is reversed, because when the suit was brought the debt was not due or could not be enforced without a demand; that the plaintiff doubting the law and faced with a difficulty which he cannot cure on a new trial, appeals to this Court, where the reversal is affirmed and judgment absolute is ordered for the defendant. Is it true that such judgment prevents utterly a future recovery on the contract? May not the plaintiff sue when the debt does mature or make the needed demand, and then maintain his action?"

See further Van Fleet's Former Adjudication, §§ 55, 56.

complied or offered to comply with the terms of the offer. Prior to October 23, Donohoe delivered an abstract of his title to attorneys for Mills. On November 18, the attorneys reported to Mills that the title was fatally defective. Whereupon Mills declined to complete the purchase and notified Donohoe and the plaintiff of his refusal. On November 23, Donohoe executed three several deeds to the lots, one to Mills, one to Cavanaugh, and one to the plaintiff, and made tender of them, demanding $165,000 at the same time. Each tender was refused. In fact, the title was not defective. Further facts appear in the opinion.[1]

Sidney V. Smith and *Vincent Neale,* for the plaintiff.

S. C. Denson, J. J. De Haven, and *Richard Bayne,* for the defendants.

McKenna, C. J. The covenants between Gray and Mills were mutual and dependent, and hence defendants urge that Gray must show not only a willingness to perform, but an ability to perform, as a condition of the recovery of damages, and have cited a number of cases illustrating the principle. The contract of Donohoe was to convey to Mills upon the payment of $165,000 and the taxes. The contract of Mills, however, was to pay $125,000 and certain lands. There was then $45,000, besides the taxes, to be paid by Gray (I omit Cavanaugh's name for convenience), and this money he expected to raise on the country lands conveyed to them by Mills. This makes Gray's ability to perform not independent of Mills' performance, as the principle would seem to require, but dependent on Mills' performance. Concurrent and dependent covenants are defined by Bouvier as follows: "Concurrent covenants are those which are to be performed by the parties to each other at the same time. A dependent covenant is one which it is not the duty of the covenantor to perform until some other covenant contained in the same agreement has been performed by the opposite party. When covenants are dependent or concurrent, the covenantee is not entitled to recover for the breach of such a covenant until after he has performed the covenants on his part."

The application of these principles seems to be obvious. The obligations between Gray and Mills were mutual, — as binding on one as the other; they were dependent, — the performance by one being the consideration of the performance by the other; concurrent, — that is, the performance by each must be at the same time as that by the other. Could this be if the ability be not also concurrent, but may wait on either side the performance on the other? The doctrine of waiver does not apply. There may be a waiver of tender of performance, — of preparation of the steps to make the ability immediately available. But efficient ability is back of, and is essential to, the obligations of the parties, and must actually exist in each

[1] The statement of facts has been abbreviated and only so much of the opinions has been printed as relates to one defence.

independent of the other. Most of the adjudged cases turn on excuses for non-tender of performance, or of non-preparation, but there are some which depend on and clearly decide the principle I have expressed. See Eddy *v.* Davis, 116 N. Y. 247, 22 N. E. 362, and cases cited; Grandy *v.* McCleese, 2 Jones (N. C.), 142; Grandy *v.* Small, 5 Jones (N. C.), 55; Brown *v.* Davis, 138 Mass. 458; M'Gehee *v.* Hill, 4 Port. (Ala.) 170. The latter case was an action by a vendee for a breach of a contract for the delivery of a large quantity of corn and fodder, and the Court said: "It is a well-settled rule of law that when a contract is dependent, as where one agrees to sell and deliver and the other agrees to pay on delivery, in an action for non-delivery it is necessary for the plaintiff to prove a readiness to pay on his part, whether the other party was ready at the place to deliver or not. . . . The instruction of the Court, therefore, that if the party believed that the credit which the corn and fodder when delivered might give, together with the other means of the plaintiff, would have enabled him to raise the money so as to have been prepared to pay, that would be sufficient evidence of readiness, was erroneous."

These cases are not opposed by Smith *v.* Lewis, 24 Conn. 624, or Southworth *v.* Smith, 7 Cush, 391. The instance in the latter was the failure to count money which was present at the proper place for payment. The Court held that the defendant's absence excused it. A real ability existed. It required but a trifling physical act to make it available for the tender or the performance of the obligation to pay. In Smith *v.* Lewis, there was also a real and substantive ability to perform. To make it available for actual performance, certain preparations were necessary, and these preparations were held to have been excused under the circumstances of the case. There was a time and place agreed upon to perform the contract, where it was understood that certain preparations were to be made. It was held that the wilful absence of one of the parties excused the want of these preparations. The Court remarked, stating the principle, and summarizing the facts: "But it is justly said that the proof must show that the plaintiff was 'ready and willing' to perform; and, the disposition and ability being proved, the only remaining objection relates to the degree of preparation. The plaintiff had not his money in his formal possession. He had not cleared his own estate from incumbrances, and had not prepared the title-deeds of his property. All these preparations he had suspended in view of his arrangement to meet the defendant, at which he had expected some facilities to be furnished by the defendant, not necessary, but convenient to himself; but all of which preparations he was able to complete, and would have completed, if the defendant had not, by his absence, under the peculiar circumstances of the case, induced him to desist."

The only resemblance of the case quoted to the case at bar is that

facilities were to be furnished by the defendant. Here the resemblance stops. In the quoted case these facilities were convenient, not necessary. In the case at bar, for aught that appears, they were absolutely necessary. They alone could make the readiness. In the quoted case the plaintiff had provided for the money, and witnesses testified that it would have been ready. As to the $2,000, the party who was to furnish it said that he knew the plaintiff must have a title to the place before security could be given witness, but he would have paid the money to plaintiff before the latter had received the deed, and relied on him afterwards. In the case at bar there is no ability — readiness — in plaintiff shown, of which it could be said that the facility which Mills' performance would have furnished Gray was "convenient, but not necessary." There is no testimony that Gray or Cavanaugh had either property or credit, or that they had ever been promised a loan on Mills' land. All the evidence on the subject comes from a witness by the name of Minto, who testified that he was a surveyor, — civil engineer, — and that he reported on land values for the Savings Union. After stating the value of the lands, the following question and answer were given, after some correction: "Q. By whose instructions or orders were you valuing those lands? A. The Savings Union." That an application had been made for a loan to that institution by Gray or Cavanaugh, we may assume; and also that it was so far entertained by the bank that it sent its surveyor to look at it. But whether its quality or value reported was satisfactory, there is no proof whatever. Therefore the case at bar does not satisfy the rule of Smith *v.* Lewis, even regarding it as a sound one. But the case has been criticised. The editors of Smith's Lending Cases, in a note to Cutter *v.* Powell (volume 2, p. 29), say of it: "There is no doubt that the case as decided by the majority goes to the verge of the law, and opens the door for experiments and tricks. . . . It is only by assuming as a certain fact that which the majority of the court did so assume, though, perhaps, on an insufficient finding, that the plaintiff could unquestionably have performed every item of his engagement, and would so have performed them, that the decision comes within safe principles."

The case, being an extreme one, should not be extended beyond its exact facts.

It follows that the last contention of defendants is correct, and there was not an ability to perform shown, which is a necessary condition of the recovery of damages.

Judgment will be entered for the defendants.

On writ of error the case was brought before the Circuit Court of Appeals, and after arguments before GILBERT, ROSS, and MORROW, Circuit Judges,

GILBERT, Circuit Judge, delivered the opinion of the Court.

In the bill of exceptions it is stated that there was no evidence

whatever that plaintiff had any financial ability, or that it would have been possible for him to have raised an amount sufficient to pay the price asked by Donohoe for the Market Street lot, or that he had completed any arrangement to procure a loan for any amount whatever upon the lands which, under the contract alleged in the complaint, Mills was to convey to him in exchange for the Market Street lot. Upon the writ of error in this court it is urged that the Circuit Court ruled erroneously upon the law of the case in holding that the plaintiff could not recover, for the reason that he failed to prove that he had the "independent ability" to perform the contract, by showing that he had the means to purchase the Market Street lot from Donohoe, apart from any benefit to be derived through the cash and the land which were to come from Mills in exchange therefor. If we concede that that ruling was error, it does not follow that the judgment of the Circuit Court must be reversed. It becomes our duty to consider the whole of the findings, and to determine whether, upon a proper view of the law applicable thereto, the judgment is sustainable. The findings, in brief, are that the plaintiff and Mills had entered into a valid contract, whereby the former was to convey land estimated in the contract at $235,000, in exchange for lands of the latter, estimated at $115,000, and $120,000 in cash. The land which the plaintiff was to convey did not belong to him, and he had not then, nor did he afterwards acquire, any estate or interest therein. He had received a written offer from the owner of the property to sell it for $165,000 cash and one-half the taxes of the current year. The offer was never accepted. It was without consideration. It was a bare offer to sell, and could have been rescinded at any time. In fact, the offer has no bearing upon the decision of this case. It left the property in the same relation to the contract in which it would have stood had there been no such instrument. When Mills withdrew from the contract, he had discovered that the title to the land he was to purchase was not in the plaintiff, but was in Donohoe. It is true that he did not place his refusal to perform upon that ground, but on the ground that the title in Donohoe was found to be defective; but that fact is immaterial so far as this case is concerned. The case presented for our consideration, therefore, is one in which the plaintiff made a contract to sell real estate of which he was not the owner, and in which he had no right, title, nor interest, nor the ability to compel, by the law or otherwise, a conveyance from the owner.

It is contended by the plaintiff in error that the refusal of Mills to be bound by his contract, before the time for its completion had arrived, excuses the plaintiff from showing or proving that he had the ability to perform the contract upon his part. It is true that where the vendor of property, before the arrival of the time for the completion of his contract of sale or conveyance, disables himself from performing by disposing of the property to another, the

purchaser may at once bring his action, and he need not aver or prove tender of the purchase money upon his part, nor his ability to carry out the contract; and, where either party to a contract gives notice to the other that he will not comply with its terms, the other is excused from averring or proving a tender of performance. But, in any case of action upon a contract, the elements of the plaintiff's damage must be certain, and the facts must exist from which it may be deduced that he has suffered loss. One who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated if the purchaser withdraws from the contract. The pleadings and the finding in this case leave it uncertain whether the plaintiff could ever have acquired title to the Market Street lot. So far as the performance of his contract was concerned, he was in no better attitude than one who has disabled himself from carrying out a contract of sale by selling the property to another.

In Bigler *v.* Morgan, 77 N. Y. 312, the Court said: "However positively a vendee may have refused to perform his contract, and however insufficient the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for had he performed," — citing Heron *v.* Hoffner, 3 Rawle, 393, 400; Bank of Columbia *v.* Hagner, 1 Pet. 464; Traver *v.* Halsted, 23 Wend. 66.

In Eddy *v.* Davis, 116 N. Y. 247, 251, 22 N. E. 362, 363, the Court said: "The formal requisite of a tender may be waived, but to establish a waiver, there must be an existing capacity to perform. Here there was no existing capacity, as, having, sold all the adjacent lands plaintiffs could not perform their covenant to keep open a right of way back of defendant's store."

In Townsend *v.* Goodfellow, 40 Minn. 312, 41 N. W. 1056, the Court said: "And one who speculates upon that of which he has no control or the means of acquiring it is not a *bona fide* contractor. But the general rule is that, where a contract is entered into in good faith, it is not necessary that the vendor be actually in the situation to perform it at the time it is entered into, provided he be able at the proper time to place himself in that situation."

In Burks *v.* Davies, 85 Cal. 110, 24 Pac. 613, the Court cited with approval the rule of the English courts that: "Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor is it in his power, by the ordinary course of law or equity, to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take: for any seller ought to be a *bona fide* contractor, and it would lead to infinite mischief if an owner were permitted to speculate upon the sale of another's estate. Tendring *v.* London, 2 Eq. Cas. Abr. 680."

Of similar import are Carpenter *v.* Holcomb, 105 Mass. 285; Lawrence *v.* Miller, 86 N. Y. 131; Nelson *v.* Elevating Co., 55 N. Y. 480.

None of the cases cited by the plaintiff in error sustain the doctrine which he contends for. Among others is cited the case of North's Adm'r. *v.* Pepper, 21 Wend. 636, where it was held, that if a purchaser of property gives notice to the vendor that he has abandoned the contract, and will not accept a conveyance, it is sufficient to support an action of the covenant by the vendor to allege the fact that he has received such notice, and it is not necessary that he aver a tender of the deed or readiness to perform, nor that he had title to the premises which he had agreed to convey. But the Court in that case expressly recognized the principle that, if the vendor had not the title nor such contractual relation thereto as to render it certain that he could procure the same, he had no ground upon which to recover damages, and held that, in the case of notice of refusal to perform the contract upon the part of the purchaser, it would be a sufficient defence to an action by the vendor to plead that the latter had no title. The case at bar comes directly within the principle declared in that case. It is alleged in the answer in the record in this case that the plaintiff had no title to the Market Street lot, and that allegation is affirmatively sustained by the findings. Judgment will be affirmed, with costs to the defendants in error.[1]

SECTION III

IMPOSSIBILITY

BAILY *v.* DE CRESPIGNY

In the Queen's Bench, January 20, 1869

[*Reported in Law Reports, 4 Queen's Bench,* 180]

The judgment of the Court (Cockburn, C. J., Lush, and Hayes, JJ.) was delivered by —

Hannen, J. This was an action on a covenant contained in a lease of certain premises granted by the defendant to the plaintiff in 1840, for a term of eighty-nine years, whereby the defendant covenanted that "neither he nor his assigns should or would, during the term, permit to be built any messuage, etc., on a paddock fronting

[1] In Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, the plaintiff sued the defendant for breach of a contract to buy silk on August 15th. The court said: "Conceding that the defendant's repudiation of the whole contract before August 15th absolved the sellers from the duty of tendering an instalment on that date and gave them a immediate right of action against the defendant for a breach of contract, nevertheless when it appeared, as it did on the trial, that by no possibility could the sellers have made tender of the silk due August 15th, because the silk did not arrive in New York until a later day, it became evident that as to that instalment the sellers suffered no loss by the breach." Compare Bradley *v.* Benjamin, 46 L. J. Q. B. 590; Lowe *v.* Harwood, 139 Mass. 133; Fotornick *v.* Watson, 184 Mass. 187, 193; Dosch *v.* Andrus, 111 Minn. 287.

the demised premises." The breaches alleged are: 1. That the defendant during the term permitted a railway station to be built on the paddock. 2. That the defendant assigned the paddock to the London and Brighton Railway Company, who erected the railway station on the paddock.

To this declaration the defendant pleaded that, after the making of the deed, the railway company required to take the paddock under powers given them by act of Parliament, 1862, for purposes for which they were by the act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the act; and that the company under the powers so conferred, did compulsorily purchase and take the paddock; and that the assignment by defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the act, and that, except as aforesaid, the defendant did not permit the said erections to be built. The plaintiff demurred to this plea; and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this replication there was a demurrer.

It must be taken on these pleadings that the assignment by the defendants to the railway company was altogether made under the requirements of the act of Parliament, and without any stipulation introduced into the conveyance of the vendor or the purchaser, which would alter its character as an act done by the defendant in obedience to the command of the legislature. The 75th section of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they shall direct, and in default thereof it shall be lawful for the promoters to execute a deed poll declaring the fact of such default having been made, and thereupon all the estate and interest in such lands, capable of being sold and conveyed by such owner shall vest absolutely in the promoters of the undertaking.

We think that no distinction can be drawn between the case of an owner of lands who does that which it is his duty to do — namely, conveys to the company — and one who by refusing to convey obliges the company to obtain a title to the lands by the execution of a deed poll. In the one case, as in the other, the transfer of the title is compelled by the legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position than one who refuses compliance. In either case the railway company must be regarded as the assignee of the land, not by the voluntary act of the former owner, but by compulsion of law.

The substantial question, therefore, raised on this record is whether the defendant is discharged from his covenant by the subsequent act of Parliament, which put it out of his power to perform it.

We are of opinion that he is so discharged on the principle expressed in the maxim *Lex non cogit ad impossibilia.*

We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance; and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.[1]

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.[2] It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in Canham *v.* Barry, 15 C. B. at p. 619; 24 L. J. (C. P.) at p. 106, a man might by apt words bind himself that it shall rain tomorrow or that he will pay damages. This is the explanation of the case put by Lord Coke in Shelley's case, 1 Rep. at p. 98, *a:* "If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant," because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy. (See Shep. Touch. 173). It is on this principle that it has been held that an impossibility, arising from an act of the legislature subsequent to the contract, discharges the contractor from liability. Again, to quote an observation of Maule, J., in Mayor of Berwick *v.* Oswald, 3 E. & B. 665; 23 L. J. (Q. B.) at 324, there is nothing "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law; . . . but people in general must always be considered as contracting with reference to the law as existing at the time of the contract. . . . And the words showing a

[1] See Kelley *v.* Insurance Co., 109 Fed. Rep. 56, 114 Fed. Rep. 268.

[2] The preceding thirteen lines are quoted by JACKSON, J., in Chicago, &c. Ry. Co. *v.* Hoyt, 149 U. S. 1, 14.

contrary intention ought to be pretty clear to rebut that presumption." To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made. This is the principle of that which was laid down in Brewster *v.* Kitchell, 1 Salk. 198, that "where H. covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed."

To apply the foregoing observations to the present case: The defendant has covenanted that his "assigns" shall not build. The word "assigns" is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. Spencer's case, 5 Rep. 16. The defendant when he contracted used the general word "assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties. On the other hand, to confine the word "assigns" to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee; because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be collected from their words, interpreted according to their known ordinary signification.

It was, indeed, conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company, as he would have been for the acts of any other assignee; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the act of Parliament to do, and not as to those which the company was merely empowered to do.

We do not think that this distinction is well founded. The rule laid down in Brewster *v.* Kitchell, 1 Salk. 198, rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a cove-

nant which the legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is *empowered* to do, as those which it is *required* to do; why, then, should there be a difference in the liability of the covenantor with respect to the one and the other?

But, assuming that the imposing on the defendant by the legislature of assigns whom he could not control would, without more, free him from the engagements which he entered into with reference to assigns whom he could control, it remains necessary to deal with the argument that, though the company was empowered to take the lands free from the restrictions upon building, this was only on condition of paying full compensation for what they got, and that it must be supposed that the defendant obtained from the company not only the value of the land as he held it, encumbered with a covenant not to build, but also what was deemed a fair consideration for the right to build.

It appears to be assumed in this argument that the difference between the price of the land encumbered with the covenant not to build and the price of it freed from that covenant, would be the amount of damages to be paid by the defendant to the plaintiff in the present action. But that is not so; the plaintiff, if entitled to recover at all in this action, would be entitled to the damage he had sustained by the breach of the covenant, even if these damages should exceed the whole value of the land taken. No doubt, if the legislature had in express terms, or by necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company, this would have indicated that the legislature did not intend that the defendant should be freed from liability on his covenant, although he was disabled from performing it. But we cannot find in the railway acts any express or implied enactment to this effect. It has been already pointed out that there is no relation between the compensation which the defendant would be entitled to for his land and the damages for which he would be liable to the plaintiff. How could it be possible for the defendant to lay before the compensation jury evidence of the extent of his liability on such a covenant as that under consideration? How could he, in an inquiry to which the plaintiff was no party, offer evidence of the injury which the plaintiff might by any possibility sustain in the uncertain event of the company erecting a station or other building on the land taken?

Further, if the covenant of the defendant is to be considered as broken by the act of the railway company so as to entitle the plaintiff to damages, it must be deemed to carry with it the other consequences of a breach of contract. Thus, if the situation of the plaintiff and the defendant in this case had been reversed, and the covenant not to build on land adjoining the demised premises had

been entered into by a lessee, with the usual proviso for re-entry in the event of breach of any covenant, the lessee would have been liable to forfeiture of his whole interest by reason of an act over which he had no control; and the railway company would be liable, if the plaintiff's contention be correct, to pay, by way of compensation for a piece of land taken, the whole value of the interest of the lessee in the adjoining estate.

The solution of the case appears to be that the plaintiff is one of a numerous class of persons injured by the construction of a railway, for whom the legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station with the appurtenances, including water-closets and urinals. These are heads of damage for which railway companies are not in ordinary circumstances bound to give compensation, but for which the defendant would be liable in an action on his covenant.

We do not think that it was the intention of the legislature to make a railway company liable for such damages in the exceptional case of a person, in the position of the plaintiff, having taken a covenant from his lessor on the terms of that under consideration, or that, if such had been the intention of the legislature, so peculiar a head of compensation as that now suggested, namely, for liability to damages for breach of collateral covenants resulting from the taking of lands, would have been left to be conjectured from the vague language of the Lands Clauses Consolidation Act.

For these reasons we are of opinion that our judgment ought to be for the defendant. *Judgment for the defendant.*

HOWELL *v.* COUPLAND

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, JANUARY 18, 1876

[*Reported in Law Reports,* 1 *Queen's Bench Division,* 258]

APPEAL by the plaintiff from the decision of the Court of Queen's Bench making absolute a rule to enter the verdict for the defendant.

The plaintiff is a potato merchant at Holbeach, Lincolnshire, and the defendant a farmer at Whaplode in the same county.

In 1872 the defendant, at the proper season, and in the due course of husbandry, appropriated between eighty and ninety acres of land for the growth of potatoes, — sixty-eight acres at Whaplode, and about twenty at Holbeach.

In March of the same year the plaintiff and the defendant entered into the following contract: "A memorandum of agreement, made

this day of , 1872, between Robert Coupland, of Whaplode, and John Howell, of Holbeach, whereby Robert Coupland agrees to sell, and the said John Howell agrees to purchase, 200 tons of regent potatoes grown on land belonging to the said Robert Coupland in Whaplode, at and after the rate of £3 10*s.* 6*d.* per ton, to be riddled on 1⅝-in. riddle, and delivered at Holbeach railway station, good and marketable ware, during the months of September or October, as the said John Howell may direct, and, under his direction, the purchaser to find riddles. It is further agreed between the said Robert Coupland and the said John Howell that the said potatoes shall be paid for when and as they are taken away."

At the time of making the contract, out of the sixty-eight acres in Whaplode, twenty-five were actually sown with potatoes, and the remaining forty-three acres were ready for sowing. The forty-three acres were afterwards sown in due course, and the whole sixty-eight acres together were amply sufficient, in an ordinary season and in the ordinary course of cultivation, to produce a much larger quantity than two hundred tons, the land producing, on an average, seven tons to the acre.

In July and August, without any fault on the part of defendant, a disease, which no skill or care on the part of the defendant could have prevented, attacked the crop and caused it to fail; and when the time for taking it up arrived, the whole marketable produce of the crop of the lands of the defendant, both in Whaplode and Holbeach together, amounted to no more than 79 tons 8 cwt., and this quantity the defendant delivered to the plaintiff. The rest of the crop had perished from the disease.

If the defendant had had other land to plant with potatoes at the time when the disease was discovered, which in fact he had not, it would have been too late to sow it.

The present action was brought to recover damages for the non-delivery of the residue of the two hundred tons, and the verdict at the trial was entered for £432 5*s.*, leave being reserved to move to enter the verdict for the defendant, on the ground that he was not liable to deliver the ungrown potatoes.

A rule having been obtained accordingly, it was made absolute by the Court of Queen's Bench on the 22d of May, 1874.

D. Seymour, Q. C., and *Waddy,* Q. C., in support of the motion.

Herschell, Q. C., and *Beasley, contra,* were not heard.

Lord Coleridge, C. J. I am of opinion that the judgment ought to be affirmed. [The Lord Chief Justice read the contract and facts.] The Court of Queen's Bench held that, under these circumstances, the principle of Taylor *v.* Caldwell, 3 B. & S. 826; 32 L. J. (Q. B.) 164 and Appleby *v.* Myers, L. R. 2 C. P. 651, applied, and the defendant was excused from the performance of his contract. The true ground, as it seems to me, on which the contract should be interpreted, and which is the ground on which, I believe, the Court

of Queen's Bench proceeded, is that by the simple and obvious construction of the agreement, both parties understood and agreed that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for the performance. They had been in existence, and had been destroyed by causes over which the defendant, the contractor, had no control, and it became impossible for him to perform his contract; and, according to the condition which the parties had understood should be in the contract, he was excused from the performance. It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place. On the facts the condition did arise and the performance was excused. I am, therefore, of opinion that the judgment of the Queen's Bench should be affirmed.

JAMES, L. J. I think the case was rightly considered in the court below to turn upon the construction of the contract. Is it a contract for a certain quantity of potatoes of a particular sort, with a warranty that they shall be supplied; or is it a contract to deliver two hundred tons of potatoes out of a specific crop? I am of opinion it is the latter; and if so, the principle of the cases relied on applies, and the defendant is excused by reason of his being prevented by causes for which he is not answerable.

MELLISH, L. J. I am of the same opinion. The words of the contract are clear: the defendant "agrees to sell two hundred tons of regent potatoes grown on land belonging to him in Whaplode." That is, potatoes which shall be grown in Whaplode. They are to be grown there, and delivered to the plaintiff provided they are grown there. Is not that a condition, — so that, according to the cases on which the Court of Queen's Bench acted, if the thing perishes before the time for performance, the vendor is excused from performance by the delivery of the thing contracted for? No doubt there is a distinction in the present case, that the potatoes, the things contracted for, were not in existence at the time the contract was entered into. But can that make any real difference in principle? Suppose the potatoes had been full grown at the time of the contract, and afterwards the disease had come and destroyed them; according to the authorities it is clear that the performance would have been excused; and I cannot think it makes any difference that the potatoes were not then in existence. This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy two hundred tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things; therefore neither party is liable if the performance becomes impossible. The language of this contract is much easier to imply a condition from than in most former cases where it has been held to be implied.

Baggallay, J. A. I at first doubted whether the contract excluded the possibility of the defendant being able to perform his contract by delivering potatoes grown on other land; but on consideration it is clear the contract is confined to particular land; and the statement in the case is that sixty-eight acres, the amount actually sown with potatoes, was a due proportion to enable the defendant to perform his contract in an ordinary season.

Cleasby, B. I am of the same opinion. I put my decision, not so much on the ground that the defendant was excused by the act of God rendering the performance impossible, as upon the terms of the contract itself. This is not like a contract where the parties have agreed to deliver a cargo of grain at Odessa or any other port by a given time, in which case the parties are bound by the contract, although its performance has become impossible by *vis major*. Here there was not an absolute contract to deliver two hundred tons of potatoes in September and October, but two hundred tons of potatoes grown on particular land. Not two hundred tons of potatoes simply, but two hundred tons off particular land. The crop on this particular land has failed, and there is nothing to which the promise can apply. If the crop had existed at the time of the contract, and had afterwards failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract.

Appeal dismissed.[1]

ANDERSON *v.* MAY et al.

Minnesota Supreme Court, June, 1892

[*Reported in* 52 *Northwestern Reporter,* 530]

Gilfillan, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market-gardening farm near Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular

[1] Browne *v.* United States, 30 Ct. Cl. 124; Ontario Fruit Assoc. *v.* Cutting Packing Co., 134 Cal. 21; Losecco *v.* Gregory, 108 La. 648, *acc.*

See also Nickoll *v.* Ashton, [1901] 2 K. B. 126; Stewart *v.* Stone, 127 N. Y. 500. Compare Ashmore *v.* Cox, [1899] 1 Q. B. 436; Jones *v.* United States, 96 U. S. 24; Summers *v.* Hibbard, 153 Ill. 102; Booth *v.* Mill Co., 60 N. Y. 487.

land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified, — a contract in its nature possible of performance. As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early, unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity. What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by, or within the control of, the party." An application of this rule is furnished by Cowley *v.* Davidson, 13 Minn. 92. What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specific chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in Howell *v.* Coupland, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that,

where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in Adams *v.* Nichols, 19 Pick. 275, 279; School Dist. *v.* Dauchy, 25 Conn. 530; and Trustees *v.* Bennett, 27 N. J. Law, 513, approved and followed in Stees *v.* Leonard, 20 Minn. 494. Where such causes may intervene to prevent a party performing, he should guard against them in his contract. *Order reversed.*[1]

JOHN A. STEES *v.* CHARLES LEONARD

MINNESOTA SUPREME COURT, April, 1874

[*Reported in* 20 *Minnesota,* 494]

THE defendants, who are architects and builders, having, at plaintiff's request, furnished them with plans and specifications for a building proposed to be erected by them on their own land, afterwards, and on the 18th August, 1868, the plaintiffs and defendants made and executed a contract under seal, in which they are all described as "of the city of St. Paul," etc. By the terms of the contract, the defendants "agree to and with the said John A. and Washington M. Stees, to well and truly build, erect, and complete the three-story business house proposed to be erected by the said J. A. & W. M. Stees, on Minnesota Street, between Third and Fourth streets; all in accordance with the plans and specifications of the same, with such alterations as are mentioned in said specifiations, prepared by M. Sheire & Bro., architects, and signed by both parties; the building, with the exception of painting, to be completed on or before the first day of January, 1869. In consideration whereof the said John A. & W. M. Stees . . . agree to pay, or cause to be paid, unto the said Charles Leonard, Monroe and Romaine Sheire, . . . the sum of $6,735 in payments as follows: $500 when the excavation is completed; $800 when the basement walls are up; $800 when the first-story walls are up; $1,000 when the second-story walls are up; $1,200 when the third-story walls are up and the roof on; $1,200 when the plastering is done; and the balance when the building is completed." The specifications annexed to the contract are very full, and provide (among other things) that "All the walls shall be the following thickness: foundation walls, two feet thick, and shall have footings six inches thick, which shall run clear across walls and project six inches on each side of wall above it." The specifications

[1] Compare Rice *v.* Weber, 48 Ill. App. 573.

contain no other provisions relating to the character of the foundation for the building.

The defendants entered upon the performance of the contract and erected the proposed building to a height of three stories, when it fell to the ground, on the 1st November, 1868. In the following year the defendants again attempted to perform the contract, and again erected the building to the same height as before, when it again fell, on the 1st August, 1869, whereupon the defendants abandoned the work, and refused to perform the contract.[1]

At the trial in the district court for Ramsey County, the defendants made the following offers of proof: —

That at the time when plaintiffs applied to defendants to draw plans and specifications for the buildings mentioned in the complaint, the matter of draining the lot on which the building was to be erected was talked over between the parties; and that the plaintiffs then stated that they did not think that such a lot would need draining, but if any draining should be needed, they would do it.

To which the plaintiffs objected as incompetent, immaterial, and irrelevant, and because the contract was in writing.

That in architecture and building, "footings," when used in a building, are the lowest portion of the structure, and the only artificial foundation employed for the building, when footings are employed.

That they constructed each of these buildings that fell, in all respects as required by the contract and specifications.

The evidence thus offered, as well as that contained in two other offers of proof, stated in the opinion, was objected to as incompetent, irrelevant, and immaterial, and in each case the objections were sustained, and the defendants excepted.

The jury found for the plaintiffs. The defendants moved, upon a bill of exceptions, for a new trial, and appeal from the order denying their motion.

Lampreys, and *Gilfillan & Williams,* for appellants.

Bigelow, Flandrau, & Clark, for respondents.

Young, J. The general principle of law which underlies this case is well established. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability. The law does no more than enforce the contract as the parties themselves have made it. Many cases

[1] A statement of the pleadings is here given in the case as reported.

illustrating the application of the doctrine to every variety of contract, are collected in the note to Cutter *v.* Powell, 2 Smith Lead. Cas. 1.

The rule has been applied in several recent cases, closely analogous to the present in their leading facts. In Adams *v.* Nichols, 19 Pick. 275, the defendant Nichols contracted to erect a dwelling-house for plaintiff on plaintiff's land. The house was nearly completed, when it was destroyed by accidental fire. It was held that the casualty did not relieve the contractor from his obligation to perform the contract he had deliberately entered into. The court clearly state and illustrate the rule, as laid down in the note to Walton *v.* Waterhouse, 2 Wms. Saunders, 422, and add: "In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts."

In School Dist. *v.* Dauchy, 25 Conn. 530, the defendant contracted to build and complete a schoolhouse. When nearly finished, the building was struck by lightning, and consumed by the consequent fire; and the defendant refused to rebuild, although plaintiffs offered to allow him such further time as should be necessary. It was held that this non-performance was not excused by the destruction of the building. The court thus state the rule: "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful."

School Trustees *v.* Bennett, 3 Dutcher, 513, is almost identical in its material facts with the present case. The contractors agreed to build and complete a schoolhouse, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by plaintiff, and designated in the contract. When the building was nearly completed it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry, and unable to sustain the weight of the building; although, when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pickaxe, and its defects were latent. The plaintiff had a verdict for the amount of the instalments paid under the contract as the work progressed. The verdict was sustained by the Supreme Court, which held that the loss, although arising solely from a latent defect in the soil, and not from a faulty construction of the building, must fall on the contractor.

In the opinion of the court, the question is fully examined, many

cases are cited, and the rule is stated, "that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. . . . If before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done, and he has contracted to do it. . . . No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it. or rather, the law leaves it where the agreement of the parties has put it. . . . Neither the destruction of the incomplete building by a tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, *necessarily* prevented the performance of the contract to build, erect, and complete this building for the specified price. It can still be done, for aught that was opened to the jury as a defence, and overruled by the court."

In Dermott *v.* Jones, 2 Wall. 1, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of the work. The contractor having sued for his pay, it was held that the owner might recoup the damages sustained by his deviation from the contract. The court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Nothing can be added to the clear and cogent arguments we have quoted, in vindication of the wisdom and justice of the rule, which must govern this case unless it is in some way distinguishable from the cases cited.

It is argued that the spot on which the building is to be erected is not designated with precision in the contract, but is left to be selected by the owner; that, under the contract, the right to designate the particular spot being reserved to plaintiffs, they must select one that will sustain the building described in the specifications, and if the spot they select is not, in its natural state, suitable, they must make it so; that in this respect he present case differs from School Trustees *v.* Bennett.

The contract does not, perhaps, designate the site of the proposed building with absolute certainty; but in this particular it is aided by the pleadings. The complaint states that defendants contracted to erect the proposed building on "a *certain piece* of land of which the plaintiffs then were and now are the owners in fee, fronting on Minnesota Street, between Third and Fourth streets, in the city of St. Paul." The answer expressly admits that the defendants entered into a contract to erect the building, according to the plans, &c., "on that certain piece of land in said complaint described," and that they "entered upon the performance of said contract, and proceeded with the erection of said building," &c. This is an express admission that the contract was made with reference to the identical piece of land on which the defendants afterwards attempted to perform it, and leaves no foundation in fact for the defendants' argument.

It is no defence to the action, that the specifications directed that "footings" should be used as the foundation of the building, and that the defendants, in the construction of these footings, as well as in all other particulars, conformed to the specifications. The defendants contracted to "erect and complete the building." Whatever was necessary to be done in order to complete the building, they were bound by the contract to do. If the building could not be completed without other or stronger foundations than the footings specified, they were bound to furnish such other foundations. If the building could not be erected without draining the land, then they must drain the land, "because they have agreed to do everything necessary to erect and complete the building." (3 Dutcher, 525; and see Dermott *v.* Jones, *supra,* where the same point was made by the contractor, but ruled against him by the court.)

As the draining of the land was, in fact, necessary to the erection and completion of the building, it was a thing to be done, under the contract, by the defendants. The prior parol agreement that plaintiffs should drain the land, related, therefore, to a matter embraced within the terms of the written contract, and was not, as claimed by defendants' counsel, collateral thereto. It was, accordingly, under the familiar rule, inadmissible in evidence to vary the terms of the written contract, and was properly excluded.[1]

[1] In United States *v.* Spearin, 248 United States, 132, 136, Brandeis, J. for the court said:

Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Day *v.* United States, 245 U. S. 159; Phoenix Bridge Co. *v.* United States, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. Simpson *v.* United States, 172 U. S. 372; Dermott *v.* Jones, 2 Wall. 1. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. MacKnight Flintic Stone Co. *v.* The Mayor, 160 N. Y. 72; Filbert *v.* Philadelphia, 181 Pa. St. 530; Bentley *v.* State, 73 Wisconsin, 416. See Sundstrom *v.* New York, 213 N. Y. 68. This responsi-

In their second and third offers, the defendants proposed to prove that after the making of the written contract, and when the defendants, in the course of their excavation for the cellar and foundation, first discovered that the soil, being porous and spongy, would not sustain the building, unless drained, the plaintiffs proposed and promised to keep the soil well drained during the construction of the building; that, in consequence, the defendants did not drain the same; that plaintiffs for a time kept the soil drained, but afterwards and just before the fall of the building, they neglected to drain, in consequence of which neglect the soil became saturated with water, and the building fell; and that a like promise was made by plaintiffs at the beginning of the erection of the second building, followed by like part performance and neglect, and subsequent, and consequent, fall of the building.

The rule that a sealed contract cannot be varied by a subsequent parol agreement is of great antiquity, the maxim on which it rests, *unumquodque dissolvitur eodem modo quo ligatur*, being one of the most ancient in our law. (Broom Leg. Max. 877; 5 Rep. 26 *a*, citing Bracton, lib. 2, fol. 28; and see Bracton, fol. 101.) In early days the rigor with which it was enforced in the courts of law led to the interference of chancery to prevent injustice. (Per Lord Ellesmere, Earl of Oxford's case, 2 Lead. Cas. in Eq. 508*; 1 Spence, Eq. Jur. 636.) In later times that rigor has become much relaxed, although the English courts of law have refused to permit sealed contracts to be varied by parol in cases of great hardship. Littler v. Holland, 3 T. R. 590; Gwynne *v.* Davy, 1 Man. & Gr. 857; West *v.* Blakeway, 2 id. 729; and see Albert *v.* Grosvenor Investment Co., L. R. 3 Q. B. 123.

But in this country it has become a well settled exception to the rule, that a sealed contract may be modified by a subsequent parol agreement, if the latter has been executed, or has been so acted on that the enforcing of the original contract would be inequitable. Monroe *v.* Perkins, 9 Pick. 298; Mill-dam Foundry *v.* Hovey, 21 Pick. 417; Blasdell *v.* Souther, 6 Gray, 149; Foster *v.* Dawber, 6 Ex. 854, and note; Thurston *v.* Ludwig, 6 Ohio St. 1; Delacroix *v.* Bulkley, 13 Wend. 71; Allen *v.* Jaquish, 21 Wend. 628; Vicary *v.* Moore, 2 Watts, 451; Lawall *v.* Rader, 24 Penn. St. 283; Carter *v.* Dilworth, 59 id. 406; Richardson *v.* Cooper, 25 Me. 450; Lawrence *v.* Dole, 11 Vt. 549; Patrick *v.* Adams, 29 Vt. 376; Siebert *v.* Leonard, 17 Minn. 436; Very *v.* Levy, 13 How. 345; 1 Sm. Lead. Cas. (6th ed.) 576.

Whether the evidence offered shows a valid consideration for the

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bility of the owner is not overcome by the usual clause requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by Christie *v.* United States, 237 U. S. 234; Hollerbach *v.* United States, 233 U. S. 165, and United States *v.* Utah, etc. Stage Co., 199 U. S. 414, 424, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.

plaintiff's promise, or whether it shows that such promise, though without consideration, has been so acted on as to enure, by way of estoppel or otherwise, to release defendants from their obligation to drain, are questions that were fully discussed at the bar, but which we are not called upon to determine; for the objection is well taken by counsel for the plaintiffs, that the evidence embraced in the second and third offers is inadmissible under the pleadings.

In their answer, the defendants allege an offer and promise by plaintiffs (made after the defendants had commenced work under the contract), to keep the land drained during the erection of the building. No consideration is alleged for this promise, and, as *nudum pactum*, it could of itself, have no effect to vary the obligations imposed on the defendants by the sealed contract. The answer proceeds to allege "that the plaintiffs wholly and wrongfully failed and neglected to drain or cause to be drained the said piece of land, or any part of the same." It is clear that the defendants would have no right to rely on this naked promise, followed by no acts of plaintiffs in part performance. If the defendants went on with the building, without taking the precaution to drain the land, they proceeded at their own risk. The answer sets up no facts on which an estoppel can be founded, and shows no defence to the action.

But the defendants, at the trial, offered to prove, not only that the plaintiffs offered to drain the land, but also "that the plaintiffs did, for a time, keep the same drained, . . . but afterwards they neglected to do so," &c. Assuming that the facts offered to be proved would constitute a defence (and we are not prepared to say they would not) no such defence is pleaded in the answer.[1]

ALONZO M. BUTTERFIELD *v.* NAPOLEON L. BYRON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, September 23, 1890–May 19, 1891

[*Reported in* 153 *Massachusetts,* 517]

CONTRACT, brought in the name of the plaintiff for the benefit of certain insurance companies, for breach of a building contract entered into between the plaintiff and the defendant. At the trial in the Superior Court, before BARKER, J., there was evidence tending to show the following facts: —

On November 13, 1888, the plaintiff, who owned a parcel of land in the town of Montgomery, on which he intended to build a hotel, and the defendant, who was a builder, entered into the contract in question, which contained the following provisions: —

"The said N. Byron covenants and agrees to and with the said A. M. Butterfield to make, erect, build, and finish in a good, substantial,

[1] A small part of the opinion is omitted.

and workmanlike manner, a three and one half story frame hotel upon lot of land situated in Montgomery, Mass., said hotel to be built agreeable to the draught, plans, explanations, or specifications furnished, or to be furnished, to said A. M. Butterfield by Richmond and Seabury, of good and substantial materials, and to be finished complete on or before the twentieth day of May, 1889.

"And said A. M. Butterfield covenants and agrees to pay to said N. Byron for the same eight thousand five hundred dollars, as follows: seventy-five per cent of the amount of work done and materials furnished during the preceding month to be paid for on the first of the following month, and the remaining twenty-five per cent to be paid thirty days after the entire completion of the building."

By the specifications referred to, the plaintiff was to do the grading, excavating, stone-work, brick-work, painting, and plumbing.

The time for completing the contract was subsequently extended to June 10, 1889, and a provision was made that the defendant should forfeit $15 for every day's default after that date. Up to May 25, 1889, the defendant had complied with the contract as far as he had gone, and had almost finished the building. The plaintiff, who had insured his interest in the building with the companies for whose benefit the action was brought, had up to the same time made payments to the defendant amounting to $5,652.30, for work done and materials furnished. On May 25 the building was struck by lightning and burned to the ground, by which event it was rendered impossible for the defendant to complete the building within the required time. The companies in which the plaintiff had insured paid him the sum of $6,914.08, viz. $5,652.30 for advances made to the defendant, and $1,261.78 for work done and materials furnished by the plaintiff in laying the foundations; and the plaintiff assigned to the companies whatever claims he might have against the defendant for breach of the contract. The plaintiff never made any demand upon the defendant to rebuild, nor offered to lay the necessary foundations for a new building. The defendant never called upon the plaintiff to lay such foundations, nor offered to rebuild.

At the trial, the plaintiff contended that he was entitled to recover in his action (1) the whole of the sum of $6,914.08, (2) $38 for certain shingles and window weights that had been saved from the fire and carried away by the defendant, and (3) the amount forfeited under the contract at the rate of $15 a day from June 10, 1889, to the date of the writ.

Upon these facts the judge directed a verdict for the defendant, and reported the case for the determination of this court, such order to be made as this court might direct.

The case was argued at the bar in September, 1890, and afterwards, in February, 1891, was submitted on the briefs to all the judges.

G. D. Robinson, for the plaintiff.

G. M. Stearns (*W. B. Stone* with him), for the defendant.

KNOWLTON, J. It is well-established law that where one contracts to furnish labor and materials, and construct a chattel or build a house on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building, without his fault, before the time fixed for the delivery of it. Adams *v.* Nichols, 19 Pick. 275; Wells *v.* Calnan, 107 Mass. 514; Dermott *v.* Jones, 2 Wall. 1; School Trustees of Trenton *v.* Bennett, 3 Dutcher, 513; Tompkins *v.* Dudley, 25 N. Y. 272. It is equally well-settled that when work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence; and the destrution of it without fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. Taylor *v.* Caldwell, 3 B. & S. 826; Lord *v.* Wheeler, 1 Gray, 282; Gilbert & Barker Manuf. Co. *v.* Butler, 146 Mass. 82; Eliot National Bank *v.* Beal, 141 Mass. 566, and cases there cited; Dexter *v.* Norton, 47 N. Y. 62; Walker *v.* Tucker, 70 Ill. 527. In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract, as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, What is the true interpretation of the contract? Was the house while in the process of erection to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest, as the builder of a part of it? Was the defendant's undertaking to go and build and deliver such a house as the contract called for, even if he should be obliged again and again to begin anew on account of the repeated destruction of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting, and plumbing were to be done by the plaintiff.

Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. Howell *v.* Coupland, 1 Q. B. D. 258.

It seems very clear that, after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting, and plumbing for another house of the same kind. The plaintiff might have answered, "I do not desire to build another house which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault I am under no further obligation." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part towards the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and if that was destroyed by inevitable accident, just before its completion, he was not bound to build another, or to do anything further under his contract.[1] If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract after a building, the product of their point contributions, had been partly erected, was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract, for neither has performed the contract so that its stipulations can be availed of. The case of Cook *v.* McCabe, 53 Wis. 250, was very similar in its facts to the one at bar, and identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a *pro rata* share of the contract price for the work performed and the materials furnished before the fire. Clark *v.* Franklin, 7 Leigh, 1, is of similar purport.

[1] Krause *v.* Board of Trustees, 162 Ind. 270, *acc.* But see Chapman *v.* Beltz Co., 48 W. Va. 1. See also Weis *v.* Devlin, 67 Tex. 507.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without default of either of the parties, is in dispute upon the authorities. The decisions in England differ from those of Massachusetts, and of most of the other States of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea can not be recovered back. Allison *v.* Bristol Ins. Co., 1 App. Cas. 209, 226; Byrne *v.* Schiller, L. R. 6. Ex. 319. In the United States and in continental Europe the rule is different. Griggs *v.* Austin 3 Pick. 20, 22; Brown *v.* Harris, 2 Gray, 359. In England it is held that one who has partly performed a contract on property of another, which is destroyed without the fault of either party, can recover nothing; and on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. Appleby *v.* Myers, L. R. 2 C. P. 651; Anglo-Egyptian Navigation Co *v.* Rennie, L. R. 10 C. P. 271.[2] One who has advanced money for the instruction of his son in trade cannot recover it back if he who received it dies without giving the instruction. Whincup *v.* Hughes, L. R. 6 C. P. 78. But where one dies and leaves unperformed a contract which is entire, his administrator may recover any instalments which were due on it before his death. Stubbs *v.* Holywell Railway, L. R. 2 Ex. 311.

In this country, where one is to make repairs on a house of another under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In Cleary *v.* Sohier, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for forty cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied assumpsit for work done and materials found. It was

[1] See also Brumby *v.* Scott, 3 Ala. 123; Clark *v.* Collier, 100 Cal. 256; Siegel *v.* Eaton & Prince Co., 165 Ill. 550; Huyett Mfg. Co. *v.* Chicago Edison Co., 167 Ill. 233; Taulbee *v.* McCarty, 144 Ky. 199; Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; Pike Electric Co. *v.* Richardson Drug Co., 42 Mo. App. 272; Murphy *v.* Forget, Rap. Jud. Quebec 19 C. S. 135.

agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. See also Lord *v.* Wheeler, 1 Gray, 282; Wells *v.* Calnan, 107 Mass. 514, 517. In Cook *v.* McCabe, *ubi supra,* the plaintiff recovered *pro rata* under his contract; that is, as we understand, he recovered on an implied assumpsit at the contract rate. In Hollis *v.* Chapman, 36 Texas, 1, and in Clark *v.* Franklin, 7 Leigh, 1, the recovery was a proportional part of the contract price. To the same effect are Schwartz *v.* Saunders, 46 Ill. 18; Rawson *v.* Clark, 70 Ill. 656; and Clark *v.* Busse, 82 Ill. 515. The same principle is applied to different facts in Jones *v.* Judd, 4 Comst. 411, and in Hargrave *v.* Conroy, 4 C. E. Green, 281. If the owner in such a case has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable.[1] Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. If the payments are to be treated merely as advancements on account of a single entire consideration, namely, the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy available in this suit is by a declaration in set-off. If, on the other hand, each instalment due was a separate consideration for the payment made at the time, then as to those instalments and the payments of them the contract is completely executed, and the plaintiff can recover nothing, and the implied assumpsit in favor of the defendant can be only for the part which remains unpaid.

[1] Keeling *v.* Schastey, 18 Cal. App. 764; Angus *v.* Scully, 176 Mass. 357; Young *v.* Chicopee, 186 Mass. 518; Canong *v.* Brown, 88 Miss. 53; Haynes *v.* Second Baptist Church, 88 Mo. 285; Dame *v.* Wood, 75 N. H. 38; Niblo *v.* Binsse, 1 Keyes, 476; Whelan *v.* Ansonia Clock Co., 97 N. Y. 293; Dolan *v.* Rogers, 149 N. Y. 489, 494; Hayes *v.* Gross, 9 N. Y. App. Div. 12 (aff'd without opinion, 162 N. Y. 610); Weis *v.* Devlin, 67 Tex. 507; Halsey *v.* Waukesha Springs Sanitarium Co. 125 Wis. 311, *acc.*

We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that, on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received, and that the like failure of consideration on the other side gave the defendant a right to sue on an implied assumpsit for work done and materials found.

The $38 due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought under an assignment for the benefit of the insurers, to recover damages for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins.

According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the Superior Court deems reasonable.

Verdict set aside.

MINERAL PARK LAND COMPANY *v.* P. A. HOWARD, ET AL.

CALIFORNIA SUPREME COURT, March 13, 1916

[*Reported in* 172 *California,* 289]

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff for $3,650. The appeal is on the judgment-roll alone.

The plaintiff was the owner of certain land in the ravine or wash known as the Arroyo Seco in South Pasadena, Los Angeles County. The defendants had made a contract with the public authorities for the construction of a concrete bridge across the Arroyo Seco. In August, 1911, the parties to this action entered into a written agreement whereby the plaintiff granted to the defendants the right to haul gravel and earth from plaintiff's land, the defendants agreeing to take therefrom all of the gravel and earth necessary in the construction of the fill and cement work on the proposed bridge, the required amount being estimated at approximately one hundred and fourteen thousand cubic yards. Defendants agreed to pay five cents per cubic yard for the first eighty thousand yards, the next ten thousand yards were to be given free of charge, and the balance was to be paid for at the rate of five cents per cubic yard.

The complaint was in two counts. The first alleged that the defendants had taken 50,131 cubic yards of earth and gravel, thereby becoming indebted to plaintiff in the sum of $2,506.55, of which only nine hundred dollars had been paid, leaving a balance of $1,606.55 due. The findings support plaintiff's claim in this regard, and there

is no question of the propriety of so much of the judgment as responds to the first count.

The second count sought to recover damages for the defendants' failure to take from plaintiff's land any more than the 50,131 yards. It alleged that the total amount of earth and gravel used by defendants was one hundred and one thousand cubic yards, of which they procured 50,869 cubic yards from some place other than plaintiff's premises. The amount due the plaintiff for this amount of earth and gravel would, under the terms of the contract, have been $2,043.45. The count charged that plaintiff's land contained enough earth and gravel to enable the defendants to take therefrom the entire amount required, and that the 50,869 yards not taken had no value to the plaintiff. Accordingly the plaintiff sought, under this head, to recover damages in the sum of $2,043.45.

The answer denied that the plaintiff's land contained any amount of earth and gravel in excess of the 50,131 cubic yards actually taken, and alleged that the defendants took from the said land all of the earth and gravel available for the work mentioned in the contract.

The court found that the plaintiff's land contained earth and gravel far in excess of one hundred and one thousand cubic yards of earth and gravel, but that only 50,131 cubic yards, the amount actually taken by the defendants, was above the water-level. No greater quantity could have been taken "by ordinary means," or except by the use, at great expense, of a steam-dredger and the earth and gravel so taken could not have been used without first having been dried at great expense and delay. On the issue raised by the plea of defendants that they took all the earth and gravel that was available, the court qualified its findings in this way: It found that the defendants did take all of the available earth and gravel from plaintiff's premises, in this, that they took and removed "all that could have been taken advantageously to defendants, or all that was practical to take and remove from a financial standpoint"; that any greater amount could have been taken only at a prohibitive cost, that is, at an expense of ten or twelve times as much as the usual cost per yard. It is also declared that the word "available" is used in the findings to mean capable of being taken and used advantageously. It was not "advantageous or practical" to have taken more material from plaintiff's land, but it was not impossible. There is a finding that the parties were not under any mutual misunderstanding regarding the amount of available gravel, but that the contract was entered into without any calculation on the part of either of the parties with reference to the amount of available earth and gravel on the premises.

The single question is whether the facts thus found justified the defendants in their failure to take from the plaintiff's land all of the earth and gravel required. This question was answered in the negative by the court below. The case was, apparently, thought to

be governed by the principle — established by a multitude of authorities — that where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by difficulty of performance, or by the fact that he becomes unable to perform. (1 Beach on Contracts, sec. 217; Klauber *v.* San Diego Street Car Co., 95 Cal. 353, [30 Pac. 555]; Wilmington Trans. Co. *v.* O'Neil, 98 Cal. 1, [32 Pac. 705]; The Harriman, 9 Wall. 172, [19 L. Ed. 629].)

It is, however, equally well settled that where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be non-existent. (1 Beach on Contracts, sec. 217; 9 Cyc. 631.) Thus, where the defendants had agreed to pasture not less than three thousand cattle on plaintiff's land, paying therefor one dollar for each and every head so pastured, and it developed that the land did not furnish feed for more than 717 head, the number actually put on the land by defendant, it was held that plaintiff could not recover the stipulated sum for the difference between the cattle pastured and the minimum of three thousand agreed to be pastured. (Williams *v.* Miller, 68 Cal, 291, [9 Pac. 166]. Similarly, in Brick Co. *v.* Pond, 38 Ohio St. 65, where the plaintiff had leased all the "good No. 1 fire clay on his land," subject to the condition that the lessees should mine or pay for not less than two thousand tons of clay every year, paying therefor twenty-five cents per ton, the court held that the lessees were not bound to pay for two thousand tons per year, unless there was No. 1 clay on the land in such quantities as would justify its being taken out. In Ridgely *v.* Conewago Iron Co., 53 Fed. 988, the holding was that a mining lease requiring the lessee to mine four thousand tons of ore annually, and to pay therefor a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposed no obligation on the lessee to pay for such stipulated quantity after the ore in the demised premises had become exhausted. There are many other cases dealing with mining leases of this character, and the general course of decision is to the effect that the performance of the obligation to take out a given quantity or to pay royalty thereon, if it be not taken out, is excused if it appears that the lands do not contain the stipulated quantity. (Brooks *v.* Cook, 135 Ala. 219; [34 South. 960]; Muhlenberg *v.* Henning, 116 Pa. St. 138, [9 Atl. 144]; McCahan *v.* Wharton, 121 Pa. St. 424, [15 Atl. 615]; Boyer *v.* Fulmer, 176 Pa. St. 282, 35 Atl. 235; Bannan *v.* Graeff, 186 Pa. St. 648, 1 Water & Min. Cas. 648, 49 Atl. 805; Gribben *v.* Atkinson, 64 Mich. 651, 31 N. W. 570; Blake *v.* Lobb's Estate, 110 Mich. 608, 68 N. W. 427; Hewitt Tron M. Co. *v.* Dessau Co., 129 Mich. 590; 89 N. W. 365; Diamond I. M. Co. *v.* Buckeye I. M. Co., 70 Minn. 500, 73 N. W. 507.)

We think the findings of fact make a case falling within the rule

of these decisions. The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available," we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it. "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." (1 Beach on Contracts, sec. 216.) We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel.

On the facts found, there should have been no recovery on the second count.

The judgment is modified by deducting therefrom the sum of $2,043.45, and as so modified, it stands affirmed.

SHAW, J., and LAWLOR, J., concurred.

BENJAMIN WHITMAN *v.* JERRY F. ANGLUM

SUPREME COURT OF ERRORS OF CONNECTICUT, January 2–March 12, 1918

[*Reported in* 92 *Connecticut,* 392]

ON the 5th of March, 1914, the parties entered into a contract in writing, whereby the plaintiff agreed to purchase and the defendant agreed to sell at least one hundred and seventy-five quarts of milk each day from April 1st, 1914, to April 1st, 1915. The contract contained the following: "The said Whitman is to come and get the milk at No. 1 Wawarme Avenue, in the City of Hartford." The premises of the defendant are known as No. 1 Wawarme Avenue.

On the 23d of November, 1914, by an order of the Commissioner of Domestic Animals for the State, all the defendant's cattle and products of his farm were quarantined. The defendant was quarantined and he was not allowed to go from the premises. Shortly after the quarantine order, all the cows on the farm were killed.

The quarantine was intended to prevent, as far as possible, all persons and animals from going on or off the premises, as well as to prevent the removal of products of all kinds that might carry infection of the "hoof and mouth disease," then prevalent among the defendant's cattle. From November 22d, 1914, the defendant failed to furnish, or offer to furnish, milk until March 13th, 1915. From a judgment in favor of the plaintiff the defendant has appealed.

Francis P. Rohrmayer, for the appellant (defendant).

James B. Henry, for the appellee (plaintiff).

SHUMWAY, J. This was an absolute, an unconditional undertaking by the defendant to sell and deliver milk daily, of the specified quality and amount. The defendant's claim is that he was excused from the performance of the contract by reason of the quarantine, which made it illegal for him to leave his premises and carry away any products of his farm or any articles that might carry infection. The quarantine order did not make it illegal to deliver milk, nor make it illegal for the defendant to procure its delivery. This much is conceded.

But the defendant contends that the clause in the contract, to wit, "The said Whitman is to come and get the milk at No. 1 Wawarme Avenue," is an essential part of the contract, and as delivery was to be made at the place named, therefore delivery under the terms of the contract was illegal. There is nothing in the record to show that the defendant could not perform his contract. While it may be true that the plaintiff could not enter the defendant's house or go upon other parts of the premises which were under quarantine, it does not follow that the contract could not be performed substantially if not literally. The contract was not to deliver milk produced on the premises. All that can be said is that the defendant was under a temporary disability to perform his contract. He is not, however, released from the obligations of his contract because it was difficult or impossible to perform them, so long as the performance was not illegal. School District No. 1 *v.* Dauchy, 25 Conn. 530; Worthington *v.* Charter Oak Life Ins. Co., 41 Conn. 372, 401.

There is no error.

In this opinion the other judges concurred.

GILBERT R. SPALDING ET AL., APPELLANTS, *v.* CARL ROSA ET AL., RESPONDENTS

NEW YORK COURT OF APPEALS, September 26–October 2, 1877

[*Reported in* 71 *New York*, 40]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendants, entered upon an order overruling exceptions and directing a judgment upon an order on trial dismissing plaintiffs' complaint.

This action was brought by plaintiffs, who were the owners and managers of the Olympic Theatre in St. Louis, to recover damages for an alleged breach of contract by defendants. By the contract defendants agreed to furnish the Wachtel Opera Troupe to give four performances per week at plaintiffs' theatre for two weeks, commencing the 26th or 27th February, 1872, plaintiffs to receive twenty per cent of the gross receipts, up to $1,800 per week, and defendants the balance. Prior to the time specified in the contract, Wachtel, who was the chief singer and attraction, and who gave the name to the troupe, was taken sick, and at the time was unable to sing. Defendants in consequence did not furnish the troupe at the time specified.

Further facts appear in the opinion.

The court at the close of the evidence directed a dismissal of the complaint, to which plaintiffs' counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

P. Cantine, for appellants.

Erastus Cooke, for respondents.

Allen, J. The contract of the defendants was for four performances per week for two weeks, commencing on the 26th or 27th of February, 1872, by the Wachtel Opera Troupe, at the plaintiffs' theatre in St. Louis.

The Wachtel Opera Troupe was well known by its name as the company, at the time of making the contract, performing in operas, under temporary engagements, at the principal theatres and opera houses in the larger cities of the United States, and composed of Wachtel as the leader and chief attraction, and from whom the company took its name, and those associated with him in different capacities, and taking the different parts in the operatic exhibitions for which they were engaged. The proof of the fact that there was a troupe or company known by that name was competent as showing what particular company was in the minds of the contracting parties, and intended, by the terms used; and as there was no controversy upon this subject, and no ambiguity arising out of the extrinsic evidence, there was no question of fact for the jury.

Wachtel had acquired a reputation in this country, as well as in Europe, as a tenor singer of superior excellence, and, in the language of the witnesses, had made a "decided hit" in his professional performances here. It was his name and capabilities that gave character to the company, and constituted its chief attraction to connoisseurs and lovers of music, filling the houses in which he appeared. His connection with the company was the inducement to the plaintiffs to enter into the contract, and give the troupe eighty per centum of the gross receipts of the houses, one-half of which went to Wachtel. Both the plaintiffs testified that it was Wachtel's popularity and capabilities as a singer upon which they relied to fill their theatre and reimburse themselves for their expenses and make a profit. The

appearance of Wachtel in the operas was the principal thing contracted for, and the presence of the others of the company was but incidental to the employment and appearance of the "famous German tenor." The place of any other member of the company could have been supplied, but not so of Wachtel. His presence was of the essence of the contract, and his part in the performances could not be performed by a deputy or any substitute. The plaintiffs would not have been bound to accept, and would not have accepted the services of the troupe under the contract without Wachtel; it would not have been the Wachtel Opera Troupe contracted for without him. There is no dispute as to the facts. The only question is one of law as to the effect of the sickness, and consequent inability of Wachtel to fulfil the engagement, upon the obligations of the defendants. So far as this question is concerned, it must be treated as if the contract was for the performance by Wachtel alone, as if he was the sole performer contracted for. This follows from the conceded fact that his presence was indispensable to the performance of the services agreed to be rendered by the entire company. In this view of the case, the legal question is very easy of solution, and can receive but one answer. The sickness and inability of Wachtel occurring without the fault of the defendants constitutes a valid excuse for the non-performance of the contract. Contracts of this character, for the personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular individual named, are not in their nature of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract as one of the conditions of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. This is so well settled by authority that it is unnecessary to do more than refer to a few of the authorities directly in point. People *v.* Manning, 8 Cow. 297; Jones *v.* Judd, 4 N. Y. 411; Clark *v.* Gilbert, 26 N. Y. 279; Wolfe *v.* Howes, 24 Barb, 174, 666; 20 N. Y. 197; Gray *v.* Murray, 3 J. C. R. 167; Robinson *v.* Davison, L. R. 6 Ex. 268; Boast *v.* Firth, L. R. 4 C. P. 1. The same principle was applied in Dexter *v.* Norton, 47 N. Y. 62, and for the same reasons, to a contract for the delivery of a quantity of specified cotton destroyed by fire, without the fault of the vendor, intermediate the time of making the executory contract of sale and the time for the delivery.

The judgment must be affirmed.

All concur, except Folger, J., absent. *Judgment affirmed.*[1]

[1] Boast *v.* Firth, L. R. 4 C. P. 1: Robinson *v.* Davison, L. R. 6. Ex 269: Baxter *v.* Billings, 83 Fed. Rep. 790: Schultz *v.* Johnson's Adm., 5 B. Mon. 497: Marvel *v.*

THOMAS LACY *v.* SOPHRONIA A. GETMAN

NEW YORK COURT OF APPEALS, December 19, 1889–January 14, 1890

[*Reported in* 119 *New York,* 109]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 2, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Elon R. Brown, for appellant.

W. A. Nims, for respondent.

FINCH, J. The relation of master and servant is no longer bounded by its original limits. It has broadened with the advance of civilization until the law recognizes its existence in new areas of social and business life, and yields in many directions to the influence and necessities of its later surroundings. When, therefore, it is said, generally, as the commentators mostly agree in saying, that the contract relations of principal and agent, and of master and servant, are dissolved by the death of either party, it is very certain that the statement must be limited to cases in which the relation may be deemed purely personal, and involves neither property rights nor independent action. Beyond that, a further limitation of the doctrine is asserted, which approaches very near to its utter destruction, and is claimed to be the result of modern adjudication. That limitation is that the rule applies only to the contract of the servant, and not to that of the master, and not at all, unless the service employed is that of skilled labor peculiar to the capacity and experience of the servant employed, and not the common possession of men in general; and it is proposed to adopt as a standard or test of the limitation an inquiry in each case whether the contract on the side of the master can be performed after his death by his representatives substantially, and in all its terms or requirements, or cannot be so performed without violence to some of its inherent elements.

The agitation of that question has kept the present case passing like a shuttle between the trial and the appellate courts, until it has been tried four times at the circuit and reviewed four times at Gen-

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Phillips, 162 Mass. 399; Siler *v.* Gray, 86 N. C. 566; Dickinson *v.* Calahan, 19 Pa. 227; Blakely *v.* Sousa, 197 Pa. 305; Yerrington *v.* Greene, 7 R. I. 589; Landa *v.* Shook, 87 Tex. 608; Hubbard *v.* Belden, 27 Vt. 645; Green *v.* Gilbert, 21 Wis. 395, *acc.* Compare Jennings *v.* Lyons, 39 Wis. 553. See also the following cases of contracts to marry: Hall *v.* Wright, 3 E. B. & E. 746; Vierling *v.* Bender, 113 Iowa, 337; Shackleford *v.* Hamilton, 93 Ky. 80; Gardner *v.* Arnett, 50 S. W. Rep. (Ky.) 840; Goddard *v.* Westcott, 82 Mich. 180; Trammell *v.* Vaughan (Mo.), 59 S. W. Rep. 79; Allen *v.* Baker, 86 N. C. 91; Gring *v.* Lerch, 112 Pa. 244; Sanders *v.* Coleman, 97 Va. 690.

eral Term, and at last has been sent here in the hope of securing a final repose.

The facts are few and undisputed on this appeal. The plaintiff, Lacy, contracted orally with defendant's testator, McMahan, to work for the latter upon his farm, doing its appropriate and ordinary work for a period of one year at a compensation of two hundred dollars. Lacy entered upon the service in March, doing from day to day the work of the farm under the direction of its owner, until about the middle of July, when McMahan died. By his will he made the defendant executrix, but devised and bequeathed to his widow a life estate in the farm, and the use and control of all his personal property whatsoever in the house and on the farm, during the term of her natural life. Lacy knew in a general way the terms of the will. He testifies that he knew that it gave to the widow the use of the farm, and that she talked with him about the personal property. It is admitted that the executrix did not hire or employ him, but he continued on to the close of the year, doing the farm work under the direction of the widow until the end of his full year. He sued the executrix upon his contract with the testator, and has recovered the full amount of his year's wages. From that decision the executrix appeals, claiming that the judgment should have been limited to the proportionate amount earned at the death of McMahan, and that the death of the master dissolved the contract.

It is obvious at once that an element has come into the case as now presented, which was not there when the General Term first held that the contract survived. It now appears that the executrix could not have performed her side of the contract at all after the death of McMahan, by force of her official authority, because she had neither the possession of the farm nor personal property upon it, and no right to such possession during the life of the widow. She had no power to put her servant upon the land, or employ him about it, and in her representative character she had not the slightest interest in his service and could derive no possible benefit from it. The plaintiff's labor, after the death of McMahan, was necessarily on the farm of the widow, by her consent, for her benefit, and under her direction and control, and equitably and justly should be a charge against her alone. The test of power to perform on the part of the personal representative of the deceased fails in the emergency presented by the facts, except possibly upon proof of the consent of the widow.

We have, then, the peculiar case of a contract made to work *for* McMahan and under his direction and control, which could not be performed because of his death, transmuted into a contract to work *for* Mrs. Getman upon a farm which she did not possess and had no right to enter; and performed by working for the widow and under her direction and control alone; and this because of the supposed rule that the contract survived the death of the master and remained binding upon his personal representatives.

It is true that some interest in the personal property on the farm is claimed to have vested in the executrix, notwithstanding the terms of the will; and the inventory filed by her is appealed to, and the necessity of a resort to the personal property with which to pay debts. There is no proof that the testator owed any debts, and the inventory covers nothing as to which Lacy's labor was requisite or necessary, except possibly some corn on the ground valued at eighteen dollars. All the grain inventoried was in the barn, needing only to be threshed, and must be assumed to have been there when testator died; and the other property consisted of farm tools and a cow and horse, to the use of which the widow was entitled, and which, if sold to pay possible debts, would have left the servant without means of doing his work and with nothing to do, unless for the widow. So that the bald question is presented whether the contract survived the testator's death and bound his executrix, who was without power or authority of her own to perform, and had no interest in performance.

It seems to be conceded that the death of the servant dissolves the contract. Wolfe *v.* Howes, 20 N. Y. 197; Spaulding *v.* Rosa, 71 id. 40; Devlin *v.* Mayor, etc., 63 id. 14; Fahy *v.* North, 19 Barb. 341; Clark *v.* Gilbert, 32 id. 576; Seymour *v.* Cagger, 13 Hun, 29; Boast *v.* Firth, L. R. 4 C. P. 1. Almost all of these cases were marked by the circumstances that the services belonged to the class of skilled labor. In such instances the impossibility of a substituted service by the representative of the servant is very apparent. The master has selected the servant by reason of his personal qualifications, and ought not, when he dies, to abide the choice of another or accept a service which he does not want. While these cases possess, with a single exception, that characteristic, I do not think they depend upon it. Fahy *v.* North was a contract for farm labor, ended by the sickness of the servant; and quite uniformly the general rule stated is that the servant's agreement to render personal services is dissolved by his death. There happens a total inability to perform; it is without the servant's fault; and so further performance is excused and the contract is apportioned. If in this case, Lacy had died on that day in July, his representative could not have performed his contract. McMahan, surviving, would have been free to say that he bargained for Lacy's services, and not for those of another selected and chosen by strangers, and either the contract would be broken or else dissolved. I have no doubt that it must be deemed dissolved, and that the death of the servant, bound to render personal services under a personal control, ends the contract, and irrespective of the inquiry whether those services involve skilled or common labor. For, even as it respects the latter, the servant's character, habits, capacity, industry, and temper, all enter into and affect the contract which the master makes, and are material and essential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. He was willing to hire Lacy for a

year; but Lacy's personal representative, or a laborer tendered by him, he might not want at all, and at least not for a fixed period, preventing a discharge. And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract. Babcock v. Goodrich, 3 How. Pr. (N. S.) 53.

But if that be so, on what principle shall the master be differently and more closely bound? And why shall not his death also dissolve the contract? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not every one to whom he will bind himself for a year, knowing that he must be obedient and render the services required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law; and a breach of this promise in a material matter justifies the master in discharging him. King v. St. John, Devizes, 9 B. & C. 896. One does not put himself in such relation for a fixed period without some choice as to whom he will serve. The master's habits, character, and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract are personal upon both sides, and more or less dependent upon the individuality of the contracting parties; and the rule applicable to one should be the rule which governs the other.

If now, to such a case, — that is, to the simple and normal relation of master and servant, involving daily obedience on one side and constant direction on the other — we apply the suggested test of possibility of performance in substantial accord with the contract, the result is not different. It is said that if the master dies his representatives have only to pay, and any one may do that. But under the contract, that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new master cannot perform the employer's side of the contract as the deceased would have performed it, and may vary so far, from incapacity or fitful temper or selfish greed, as to make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted.

We are, therefore, of opinion that in the case at bar the contract of

service was dissolved by the death of McMahan, and his estate was only liable for the services rendered to the date of his death.

The judgment should be reversed and a new trial granted with costs to abide the event.

All concur. *Judgment reversed.*[1]

PETER C. LAKEMAN *v.* JOSEPH W. POLLARD

MAINE SUPREME COURT, 1857

[*Reported in* 43 *Maine,* 463]

HATHAWAY, J. The plaintiff labored for the defendants at their mills in St. Johns, and by this action claims to recover his wages.

The defence is, that the labor was performed under a contract, on his part, to work for the defendants during the sawing season of 1854, which he did not fulfil.

The testimony of Bagley, Nute, and Stone that "they were not hired by the season, but only to remain there as long as they pleased," could have no legitimate effect upon the rights of the parties in this suit, and was improperly admitted. That testimony was introduced by the plaintiff as tending to show that *he* was not hired for a specified time. But the jury found that he was so hired. Else they could not have found, as they did, specially, that "he quit the defendants' employ, without their leave or consent, before the expiration of the time for which he was hired." The defendants were not aggrieved by the admission of that testimony, for the special findings of the jury show that it produced no effect.

The plaintiff contends that he was excused from the performance of his contract, and justified in quitting when he did, by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity of the mills, and that he is entitled to a reasonable compensation for the labor performed. If the fulfilment of the plaintiff's contract became impossible by the act of God, the obligation to perform it was discharged. If he was prevented by sickness or similar inability he may recover for what he did, on a *quantum meruit.* 1 Parsons on Contracts, 524.

[1] Farrow *v.* Wilson, L. R. 4 C. P. 744; Whincup *v.* Hughes, L. R. 6 C. P. 78; Harris *v.* Johnson, 98 Ga. 434; Weedon *v.* Waterhouse, 10 Hawaii, 696; Yerrington *v.* Greene, 7 R. I. 589, *acc.* Compare Volk *v.* Stowell, 98 Wis. 385.

The death of one member of a partnership is generally held to dissolve a contract of employment made with the firm. Tasker *v.* Shepherd, 6 H. & N. 575; Cowasjee Nanabhoy *v.* Lallbhoy Vullubhoy, 3 Ind. App. 200; Brace *v.* Calder, [1895] 2 Q. B. 253; Hoey *v.* McEwan, 5 Sess. Cas. 3d Ser. 814; Griggs *v.* Swift, 82 Ga. 392; Greenburg *v.* Early, 30 Abb. N. C. 300, 303. But see Phillips *v.* Alhambra Palace Co., [1901] 1 Q. B. 59; Hughes *v.* Gross, 166 Mass. 61; Nickerson *v.* Russell, 172 Mass. 584; Ferreira *v.* Sayres, 5 W. & S. 210; 3 Williston, Contracts, §1941.

The Louisiana Civil Code, Art. 2007, provides that "all contracts for the hire of labor, skill, or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there be some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee." See Tete *v.* Lanaux, 45 La. Ann. 1343.

The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it; nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so. He could not *then* have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must, necessarily, have acted at his peril, under the guidance of his judgment.

The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as *then* existing. When the laborer has adequate cause to justify an omission to fulfil his contract, such omission cannot be regarded as his fault. Whether or not the plaintiff had such cause was a question of fact, to be determined by the jury, upon the evidence.

"Where there are conflicting proofs, or some necessary facts are to be inferred from others which are proved, then it is the province of the jury to decide the cause, under instructions from the judge, as to the principles of law which should govern them." Sherwood *v.* Maverick, 5 Me. R. 295.

The question was rightly submitted to the jury, and with appropriate instructions.

No question is presented by the exceptions concerning the rulings of the court upon the subject of damages, or the amount, if any, recoverable for wages.

A report of the whole evidence, signed by the presiding, judge, as the law requires, has not been furnished to the court. Therefore the motion for a new trial cannot be entertained.

Exceptions and motion overruled.
Judgment on the verdict.

TENNEY, C. J., and APPLETON, J., concurred.

GOODENOW, J., concurred in the result only.

MAY, J., concurred, remarking that the testimony of Bagley, Nute, and Stone was admitted as contradictory of other witnesses introduced by the defendant, and not upon the main question; and for such purpose was clearly admissible.[1]

[1] Walsh *v.* Fisher, 102 Wis. 172, *acc.* As to an employer's liability on *quantum meruit* for the services rendered by an employee who becomes ill or dies before completing performance, see Ryan *v.* Dayton, 25 Conn. 188; Coe *v.* Smith, 4 Ind. 79; Hargrave *v.* Conroy, 19 N. J. Eq. 281; Wolfe *v.* Howes, 20 N. Y. 197; Clark *v.* Gilbert, 26 N. Y. 279; Parker *v.* Macomber, 17 R. I. 674; Hubbard *v.* Belden, 27 Vt. 645; Patrick *v.* Putnam, 27 Vt. 759; Green *v.* Gilbert, 21 Wis. 395; 3 Williston, Contracts, §1973.

FRANKLIN S. DEWEY *v.* THE UNION SCHOOL DISTRICT OF THE CITY OF ALPENA

MICHIGAN SUPREME COURT, April 23–April 30, 1880

[*Reported in* 43 *Michigan,* 480]

GRAVES, J. The plaintiff was regularly hired by the district to serve as teacher in its public schools for ten months for $130 per month. He entered on his duties on the 2d of September, and continued up to the 10th of December, at which time the district officers closed the schools on account of the prevalence of small-pox in the city, and kept them closed thereafter for the same reason until the 17th of March. They were then reopened and the plaintiff resumed his duties. He was subsequently hired for the next school year, and his compensation was increased $100. The district refused to pay him for the period of suspension, and he brought this action to recover it.

The claim was resisted on two grounds: *first,* that on the second hiring it was mutually agreed that the addition of $100 to his compensation for incoming service should stand and be allowed and accepted in full satisfaction of all claim for pay during the time in question; and, *second,* that the suspension was the effect of an overruling necessity, or, in other words, the act of God, and that all parts of the contract were suspended for the time being.

The circuit judge submitted to the jury both questions in a very clear manner, and instructed them to find against the plaintiff in case they were satisfied the alleged compromise was in fact entered into; or in case they should find that the small-pox was so prevalent that it became obligatory on the board to close the schools as a necessary step to prevent the spread of the disease and save human life.

The jury returned a verdict in favor of the district. But we cannot know with legal certainty whether they determined only one of these questions in favor of the district, or whether they so determined both; and of course if one only was so decided, it is impossible to say which one. The evidence on the compromise was conflicting, and as it appears in the record the advantage was with the plaintiff. Still, if no other ground of defence had been laid, the verdict must have been conclusive; as just explained, it is not so now.

The second objection must be briefly considered. Beyond controversy the closing of the schools was a wise and timely expedient, but the defence interposed cannot rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It was not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended

to show. The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be provided, and on the other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff ought to bear it.

The occasion which was presented to the district was not within the principle contended for. It was not one of absolute necessity, but of strong expediency. To let in the defence that the suspension precluded recovery, the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community; and the contract cannot be regarded as tacitly subject to such a condition.

The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.[1]

TURNER *v.* GOLDSMITH

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, January 23, 1891

[*Reported in* [1891] 1 *Queen's Bench,* 544]

LINDLEY, L. J. This is an action for breach of contract in not employing the plaintiff for the period of five years. The contract turns upon the construction of the agreement entered into by the parties, and the application of it in the events which have happened. The plaintiff wished to act as traveller to the defendant, and the defendant wished to engage him in that capacity. An agreement, dated Jan. 31, 1887, was entered into between them, which contained this recital: "Whereas, in consideration of the agreement of the said A. S. Turner, the said company" (*i. e.,* Mr. Goldsmith, and any partner he might have) "agree to employ the

[1] Gear *v.* Gray, 10 Ind. App. 428, *acc.;* Stewart *v.* Loring, 5 Allen, 306, *contra.* See also Ellis *v.* Midland Ry. Co., 7 Ont. App. 464; Libby *v.* Douglas, 175 Mass. 128, and cases cited in 3 Williston, Contracts, § 1958.

said A. S. Turner as their agent, canvasser, and traveller, upon the terms and subject to the stipulations of the conditions hereinafter contained; and in consideration of the premises the said A. S. Turner hereby agrees with the said company that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained." Stopping there, we have a clear agreement by the company to employ the plaintiff, and by the plaintiff to serve the company — and on what terms? (1) That the agency shall commence as from Jan. 31, 1887, and shall be determinable either by the company or Turner at the end of five years from the date of the agreement upon giving such notice as therein mentioned. (2) "The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from time to time forwarded or submitted by sample or pattern to him at list price to good and substantial customers." Clause 5 is only material because it repeats the words "manufactured or sold by the said company." The 8th clause provides for the plaintiff's remuneration by a commission on the goods sold by him. The other clauses are not material as regards the question before us.

It was contended by the defendant that the agreement did not contain any stipulation that the company should furnish the plaintiff with any samples, and that there was, therefore, no agreement to do what was necessary to enable him to earn commission. The answer to that is, that the company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent. Then it was said that there is no undertaking by the company to go on manufacturing. It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The defendant's place of business was burnt down; the defendant has given up business, and has made no effort to resume it. The plaintiff then says, "I am entitled to damages for your breach of the agreement to employ me for five years." The defendant pleads that the agreement was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How, then, can such a condition as the defendant contends for be implied?

It was contended that the point was settled by authority. I will refer to three cases on the subject. In Rhodes *v.* Forwood, 1 App. Cas. 256, it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could

not be implied. In the present case we find an express contract to employ him.

In Cowasjee Nanabhoy *v.* Lallbhoy Vullubhoy, L. R. 3 Ind. App. 200, there was a contract in a partnership deed to employ one of the partners during his life as sole agent to effect purchases and sales on behalf of the partnership, at a commission upon his sales. The partnership was dissolved by decree of the High Court of Bombay on the ground that the business could not be carried on at a profit. It was held that the employment was to sell on behalf of the partnership; that, the partnership having come to an end, the employment ceased, and that the partner could not claim any compensation, for that a contract to carry on the partnership during the claimant's life under all circumstances could not be implied.

Taylor *v.* Caldwell, 3 B. & S. 826, 833, contains some observations which are very much in point. Blackburn, J., there says: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which we think establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." The substance of that is that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action therefore, in my opinion, is maintainable.

The plaintiff, then, is entitled to damages, and in my opinion not merely to nominal damages; for, if I am right in my construction of the agreement, he has suffered substantial loss. We think, however, that 125*l.* is too much, and the plaintiff's counsel having

agreed to take our assessment of damages rather than be sent to a new trial, we assess them at 50*l.*, and direct judgment to be entered for the plaintiff for that amount.[1]

PEOPLE OF THE STATE OF NEW YORK *v.* THE GLOBE MUTUAL LIFE INSURANCE COMPANY

New York Court of Appeals, December 12, 1882–January 23, 1883

[*Reported in* 91 *New York,* 174]

Appeal from order of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 1, 1882, which affirmed an order of Special Term dismissing a claim presented by James C. Mix upon the fund in the hands of the receiver of the defendant.

The facts were stipulated substantially as follows: —

Defendant was a registered policy life insurance company, organized under chapter 902, Laws of 1869. In December, 1876, said Mix entered into its employment as general agent, under a contract by which he was to receive a specified annual salary for a term of not less than five years. In May, 1879, the superintendent of the insurance department made the certificate provided for by section 7 of said act, and delivered it to the attorney-general, who thereupon commenced this action and obtained an order therein restraining defendant, its officers, etc., from the further prosecution of its business or the exercise of any of its corporate franchises. A receiver of the corporation was duly appointed and it was dissolved. Mix continued in the discharge of his duties under the contract until June 15, 1879, when he was notified by the receiver of his appointment, and of the dissolution of the company.

Edward C. James, for appellant.

Geo. W. Wingate, for receiver.

John C. Keeler, for attorney-general.

Finch, J. There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was

[1] Kay, L. J., delivered a concurring opinion, and Lopes, L. J., also concurred in the decision.

Madden *v.* Jacobs, 52 La. Ann. 2107, *acc.*

not permitted to perform. The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. Shaw *v.* Republic Life Ins. Co., 69 N. Y. 286, 292; James *v.* Burchell, 82 id. 113. He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. Jones *v.* Knowles, 30 Me. 402. So that, from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation. People *v.* Security Life Ins. Co., 78 N. Y. 115. Then, too, the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of Mix differs from that of the policy-holders. We held in the Security case that the latter were creditors and stood upon a breach of their contract; but that breach was not the dissolution of the company. It antedated such dissolution, and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policy-holders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible.

The State found these contracts broken and for that reason interfered; and when its decree of dissolution came it had to deal with broken contracts, and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention. Yelland's case, L. R. 4 Eq. 350; Clarke's case, L. R. 7 Eq. 550; Logan's case, L. R. 9 Eq. 149; Maclure's case, L. R. 5 Ch. App. 737; Dean & Gilbert's case, L. J. 41 Ch. [N. S.] 476. In all of them the companies stopped payment before any intervention of the law, and this, being done by open and public notice, amounted to a voluntary refusal of performance, and, therefore, a breach of contract, established before the winding up orders were made and the liquidators appointed. When the court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken. Still another class of cases is obviously different. People *v.* National Trust Co., 82 N. Y. 283. They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties, or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an outside and independent force, operating separately, and not occasioned directly or indirectly by the act or omission of the party pleading it as an excuse. In other words such party must be innocent and blameless in respect to the *vis major* which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points and need not to be repeated. He has stated their purport correctly. In all of them both parties were innocent of and blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that in the present case the company was not only not blameless for its dissolution, but that it resulted from its own acts or omissions, was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the State as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a necessary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in section 7 of said act, and the attorney-general thereupon commenced the action for dissolution. The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much as that, but if so, the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it interest-bearing. It may have done so with entire prudence at the time, and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution, since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it. The rule must not be pushed to an extreme. Thus, in the case of the sailor having a running contract for service with the ship-owner, and sent home by a naval court as a witness against the captain for shooting one of the crew, and unable to return to the ship after the trial, and whose contract was held to be dissolved (Melville *v.* De Wolfe, 4 E. & B. 844), similar suggestions might have been made. It could have been said that it was his duty to return to the ship, but that such return had become impossible, without his fault, or that of the ship-owner, was held sufficient. Then, too, it could have been argued that if the sailor had not been present at and seen the murder, which was his voluntary act, and which he might have avoided, the law would not have sent him home. Of course nobody thought of pushing the rule to such an extreme; nor must it be done here. The sailor was not bound to foresee that his innocent and blameless presence at the scene of the murder would involve a dissolution of his contract through the intervention of the law; nor the company that its investments, honestly and prudently made, would shrink beyond repair, and bring down a dissolution by the State. If, in such case, in some sense, such dissolution may be deemed the act of the company, in a similar sense, and through the same mode of reasoning, we might, in a case of master and servant, trace the death of the former to his own negligence in eating or drinking, or exposure to heat and cold, and so determine his non-performance to be inexcusable, and to draw after it damages for a breach. As it is thus evident that a man may be, in some sense, the occasion, or even the indirect cause of his own death, and in the same sense blamable for it, without its being, in a legal sense, and considered as a *vis major,*

his own act, so a corporation may be said, through the conduct of its officers, to have, in some sort, occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the State would be not its own act, not at all the product of its own volition, and not a breach by it of its contracts previously unbroken. Especially is this true as between the company and its own officers contracting with it. One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act, or neglect, on the part of the other officers, as may tend, under the law, to produce a dissolution, if such dissolution in fact occurs. That possibility entered into his contract when made, and belonged to it as an inevitable condition, for its complete performance depended upon the corporate life, and that under the law upon the fulfilment of the law's conditions. In the event of such corporate death the motive of the State, or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion; and, however it may have been provoked or induced, it must be deemed the act of the State, and not of the corporate body; and is the independent act of the State, for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence. That may follow, or may not follow. The superintendent of insurance may make the certificate which sets the law in motion, or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses; but if he does it is his act, and not the company's; dependent wholly on his volition, and not on that of the corporation; an independent agency guided by its own motives and not the act of the company producing its own death.

If it be asked where this doctrine leaves the policy-holders, and their claims for breach of contract, the answer is two-fold. Where the dissolution follows an impaired reserve, their contracts, as we have already said, were broken by the company before the State interposed. But their rights go much deeper than that. For while in the Security case, we put those rights upon the ground of breach of contract, we did not at all decide that there was no other. If the State had dissolved this company while its contracts with the policy-holders were entirely unbroken, and by an exercise of sovereign power founded upon motives of public policy, we should still recognize and enforce the rights of policy-holders on a different ground. The assets to be distributed would be the reserve, or so much of it as remained. That reserve, as we showed in the Security case, is made up of the excess of premiums paid by the policy-holders in the earlier years of their policies beyond the real cost of insurance to enable them to be carried in later years when the risks should be greater. Practically, therefore, at the date of dissolution the reserve represents the earnings of the policies and the contributions of the

policy-holders. And as, in the case of contracts for personal services dissolved without fault by death or the act of the law, the contract is apportioned, and the servant entitled to his actual earnings to the date of dissolution, so the policy-holders would be entitled to the just earnings of their policies to the same date, and have an undoubted equity upon the assets. What they paid in excess and in advance was held by the company to some extent as their trustee and for their benefit, and when it is dissolved they have a claim upon the assets in the nature of an equitable ownership, which gives them a right beyond that of mere creditors seeking damages for a breach of contract. To make, and to carry out contracts of insurance is the very object of the corporation, and the sole purpose of and excuse for its existence. The State gives it life for that end, and takes it away when the result is not reached. It watches it during life to see that it fulfils the purpose for which it was created, and buries it when that purpose fails. And as in the creation of the company, and in its supervision and control the rights of the policy-holders and their safety are the paramount considerations, so they remain paramount when corporate death is inflicted. The blow is struck in their interest, and their equitable claim upon the assets is evident and strong. In distributing such assets a court of equity may and must give heed to equitable considerations. The claimant is not suing the company at law, for the corporation is dead. He comes in collision with the policy-holders in equity; and while he is found to have not even a just debt for damages because of his relation to the company and the nature of his contract, and therefore no shadow of an equity against the assets, the policy-holders resisting his claim are protected by an equity not to be overlooked or disregarded.

Other considerations of very serious import were adverted to by the courts below, which we need not here discuss. What has been said sufficiently indicates our opinion that no error was committed in rejecting the claim of the general agent.

The order should be affirmed.

All concur. *Order affirmed.*[1]

[1] Malcolmson *v.* Wappoo Mills, 88 Fed. Rep, 680; Lenoir *v.* Linville Improvement Co., 126 N. C. 922, *acc.* Spader *v.* Mural Decoration Co., 47 N. J. Eq. 18; Bolles *v.* Crescent Drug & Chemical Co., 53 N. J. Eq. 614; Rosenbaum *v.* United States Credit Co., 61 N. J. L. 543, *contra.*

If a corporation voluntarily winds up business it is liable for failing to fulfil its contracts. Yelland's Case, L. R. 4 Eq. 350; *Re* London, &c. Co., L. R. 7 Eq. 550; *Re* Dale, 43 Ch. D. 255; Lovell *v.* St. Louis Ins Co., 111 U. S. 264; Kalkhoff *v.* Nelson, 60 Minn. 284; Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 157; Seipel *v.* Insurance Co. 84 Pa. 47; Potts *v.* Rose Valley Mills, 167 Pa. 310. See also *Ex parte* Maclure, L. R. 5 Ch. 737; Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139. See further 3 Williston, Contracts, § 1960.

THE KRONPRINZESSIN CECILIE

UNITED STATES SUPREME COURT, April 16, May 7, 1917

[*Reported in* 244 *United States,* 12]

MR. JUSTICE HOLMES delivered the opinion of the court.

This writ was granted to review two decrees that reversed decrees of the District Court dismissing libels against the Steamship Kronprinzessin Cecilie. 238 Fed. Rep. 668. 228 Fed. Rep. 946, 965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the outbreak of the present war. The question is whether the turning back was justified by the facts that we shall state.

The Kronprinzessin Cecilie was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and, we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1892 persons, of whom 667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 354, Americans; and two or three from Italy, Belgium, Holland, &c. She continued on her voyage until about 11.05 P. M. Greenwich time. July 31, when she turned back; being then in 46° 46′ N. latitude and 30° 21′ W. longitude from Greenwich and distant from Plymouth about 1070 nautical miles. At that moment the master knew that war had been declared by Austria against Servia (July 28), that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful, and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless message to the master: "War has broken out with England, France and Russia. Return to New York." Thereupon he turned back. The probability was the steamship, if not interfered with or prevented by accident

or unfavorable weather, would have reached Plymouth between 11 P. M. August 2, and 1 A. M. August 3, and would have delivered the gold destined for England to be forwarded to London by 6 A. M., August 3. On August first at 9.40 P. M., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered of the seizures, but the vessels were detained. The German Army entered Luxembourg, and there were skimishes with French troops. On August 3 Germany was at war with France, and at 11 P. M., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, *e. g.* Prinz Adalbert [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers or people," other exceptions necessarily are to be implied, at least unless the phrase restraint of princes be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like Paradine *v.* Jane, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. Baily *v.* Crespigny, L. R. 4 Q. B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. Taylor *v.* Caldwell, 3 Best & Smith, 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. Lakeman *v.* Pollard, 43 Maine, 463. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England there can be no doubt that it would have been warranted in turning back. See Mitsui & Co., Limited, *v.* Watts, Watts & Co., Limited, [1916] 2 K. B. 826, 845.[1] The Styria, 186 U. S. 1. The

[1] In this case the defendants, shipowners, had agreed to provide a steamer to proceed to the Sea of Azoff and load a cargo and carry it to a port in Japan. The loading was not to commence before September 1, 1914, and the charterers had the option of cancellation if the steamer was not ready to receive cargo before noon on September 20th. The exceptions from liability in the charter included "arrests and restraint of princes, rulers, and people." On September 1, the defendants declined to name a

owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. The Teutonia, L. R. 4 P. C. 171. The San Roman, L. R. 5 P. C. 301, 307. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. Oliver *v.* Maryland Insurance Co., 7 Cranch, 487, 493. Craig *v.* United Insurance Co., 6 Johns. 226, 250, 253. See also British & Foreign Marine Ins. Co., Limited, *v.* Samuel Sanday & Co., [1916] A. C. 650.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office if not a binding command at least shows that if the master had remained upon his course one day longer and had received the message it would have been his duty as a prudent man to turn back. But if he had waited till then there would have been a question whether his coal would hold out. Moreover if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his

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steamer, giving as a reason that the British Government had prohibited steamers from going to the Black Sea to load. The Government in fact had issued no such prohibition. The plaintiffs accepted the repudiation as a breach and were unable to charter another steamer. The Turkish Government closed the Dardanelles on September 26, or 27th. If the defendants had sent a steamer in time to begin to load on September 20th, the steamer could not have reached the Dardanelles on her voyage to Japan before the passage was closed. The defendants were held liable on the ground that on September 1st, there was no existing restraint of princes, nor did a reasonable apprehension which turned out to be well founded that the Dardanelles would be closed before the steamer could pass through on her voyage to Japan, justify the defendants in refusing to send a steamer. Substantial damages were allowed, it being found as a fact that it was customary to insure against such risks and, therefore, that the plaintiffs would have received insurance money, if the defendants had endeavored to fulfil their contract. The liability of the defendants was affirmed in Watts, Watts & Co., Limited, *v.* Mitsui & Co. Limited, [1917] Appeal Cases, 227.

In Piaggio *v.* Somerville, 119 Miss. 6, it was held that the owners of a vessel were bound to transport a cargo from the Gulf of Mexico to Italy, as provided in a charter party, notwithstanding the risk of sinking by submarines. The contract was made during the European war, but before Germany began unrestricted submarine warfare. The defendants repudiated the contract in February, 1917, after Germany's declaration of her intention to wage such warfare. The court found, commerce was not generally suspended on that account.

voyage to avoid capture after war is declared he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier subject to the implied exceptions which it would be extravagant to say were excluded because they were written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of The Styria, 186 U. S. 1, although not strictly in point tends in the direction of the principles that we adopt.

Decree reversed.

Mr. Justice Pitney and Mr. Justice Clarke dissent, upon grounds expressed in the opinions delivered by Circuit Judges Dodge and Bingham in the Circuit Court of Appeals — 238 Fed. Rep. 668.[1]

KRELL *v.* HENRY

In the Court of Appeal, July 13–August 11, 1903

[*Reported in* [1903] 2 *King's Bench,* 740]

By a contract in writing of June 20, 1902, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the coronation processions would take place and pass along Pall Mall. The contract contained no express reference to the coronation procession, or to any other purpose for which the flat was taken. A deposit was paid when the contract was entered into. As the processions did not

[1] The grounds on which the Circuit Court of Appeals held the defendant liable were, that the act of the master in turning his vessel back on receipt of a message from the owner that war had broken out could not be treated as an exercise of the master's discretion, and the statement that war had broken out was false. Moreover, the vessel had accepted the shipment under a contract which exonerated the owner for loss occasioned by arrest and restraint of princes, rulers, or people; and no further exception of similar character could be implied. Furthermore, the contract was made when the imminence of war was known to the parties, and the specie might have been delivered eleven hours before Germany was at war with France, and more than twenty-four hours before Germany was at war with England.

take place on the days originally fixed, the defendant declined to pay the balance of the agreed rent:

Aug. 11. VAUGHAN WILLIAMS, L. J., read the following written judgment: The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of Taylor *v.* Caldwell.[1] That case at least makes it clear that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with *obligationes de certo corpore*. Whatever may have been the limits of the Roman law, the case of Nickoll *v.* Ashton[2] makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root or the contract, and essential to its performance.[3] It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expressly mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a

[1] 3 B. & S. 826.

[2] [1901] 2 K. B. 126.

[3] 3 Williston, Contracts, § 1951; Hackfeld *v.* Castle, 61 Cal. Dec. 721, 198 Pac. Rep. 1041, *acc.*

character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. Now what are the facts of the present case? The contract is contained in two letters of June 20 which passed between the defendant and the plaintiff's agent, Mr. Cecil Bisgood. These letters do not mention the coronation, but speak merely of the taking of Mr. Krell's chambers, or, rather, of the use of them, in the daytime of June 26 and 27, for the sum of 75*l.*, 25*l.* then paid, balance 50*l.* to be paid on the 24th. But the affidavits, which by agreement between the parties are to be taken as stating the facts of the case, show that the plaintiff exhibited on his premises, third floor, 56A, Pall Mall, an announcement to the effect that windows to view the Royal coronation procession were to be let, and that the defendant was induced by that announcement to apply to the housekeeper on the premises, who said that the owner was willing to let the suite of rooms for the purpose of seeing the Royal procession for both days, but not nights, of June 26 and 27. In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a license to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along

the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take some one to Epsom on Derby Day at a suitable enhanced price for such a journey, say 10*l.*, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionally high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the license in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab — namely, to see the race — being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot

reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the non-happening of the procession, to use the words of Sir James Hannen in Baily *v.* DeCrespigny,[1] was an event "of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract. In both Jackson *v.* Union Marine Insurance Co.[2] and Nickoll *v.* Ashton[3] the parties might have anticipated as a possibility that perils of the sea might delay the ship and frustrate the commercial venture: in the former case the carriage of the goods to effect which the charterparty was entered into ; in the latter case the sale of the goods which were to be shipped on the steamship which was delayed. But the Court held in the former case that the basis of the contract was that the ship would arrive in time to carry out the contemplated commercial venture, and in the latter that the steamship would arrive in time for the loading of the goods the subject of the sale. I wish to observe that cases of this sort are very different from cases where a contract or warranty or representation is implied, such as was implied in The Moorcock,[4] and refused to be implied in Harmlyn *v.* Wood.[5] But The Moorcock[4] is of importance in the present case as shewing that whatever is the suggested implication — be it condition, as in this case, or warranty or representation — one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts. There seems to me to be ample authority for this proposition. Thus in Jackson *v.* Union Marine Insurance Co.,[6] in the Common Pleas, the question whether the object of the voyage

[1] L. R. 4 Q. B. 185.
[2] (1873) L. R. 8 C. P. 572.
[3] [1901] 2 K. B. 126.
[4] 14 P. D. 64.
[5] [1891] 2 Q. B. 488.
[6] L. R. 8 C. P. 572; (1874) 10 C. P. 125; 42 L. J. (C. P.) 284.

had been frustrated by the delay of the ship was left as a question of fact to the jury, although there was nothing in the charterparty defining the time within which the charterers were to supply the cargo of iron rails for San Francisco, and nothing on the face of the charterparty to indicate the importance of time in the venture; and that was a case in which, as Bramwell B., points out in his judgment at p. 148, Taylor *v.* Caldwell [1] was a strong authority to support the conclusion arrived at in the judgment — that the ship not arriving in time for the voyage contemplated, but at such time as to frustrate the commercial venture, was not only a breach of the contract but discharged the charterer, though he had such an excuse that no action would lie. And, again, in Harris *v.* Dreesman [2] the vessel had to be loaded, as no particular time was mentioned, within a reasonable time; and, in judging of a reasonable time, the Court approved of evidence being given that the defendants, the charterers, to the knowledge of the plaintiffs, had no control over the colliery from which both parties knew that the coal was to come; and that, although all that was said in the charterparty was that the vessel should proceed to Spital Tongue's Spout (the spout of the Spital Tongue's Colliery), and there take on board from the freighters a full and complete cargo of coals, and five tons of coke, and although there was no evidence to prove any custom in the port as to loading vessels in turn. Again it was held in Mumford *v.* Gething [3] that, in construing a written contract of service under which A. was to enter the employ of B., oral evidence is admissable to shew in what capacity A. was to serve B. See also Price *v.* Mouat.[4] The rule seems to be that which is laid down in Taylor on Evidence, vol. ii s. 1082: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received." And Lord Campbell in his judgment says: "I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract." See per Campbell C. J., Macdonald *v.* Longbottom.[5] It seems to me that the language of Willes J. in Lloyd *v.* Guibert [6] points in the same direction. I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession

[1] 3 B. & S. 826.
[2] (1854) 23 L. J. (Ex.) 210.
[3] (1859) 7 C. B. (N. S.) 305.
[4] (1862) 11 C. B. (N. S.) 508.
[5] (1859) 1 E. & E. 977, at p. 983.
[6] (1865) 35 L. J. (Q. B.) 74, 75.

on the days proclaimed, parol evidence is admissible to shew that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of Taylor *v.* Caldwell [1] that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in evidence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract, is not expressly mentioned either as a condition of the contract or the purpose of it; but I think for the reasons which I have given that the principle of Taylor *v.* Caldwell [1] ought to be applied. This disposes of the plaintiff's claim for 50*l.* unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the 25*l.* he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it. I have only to add that the facts of this case do not bring it within the principle laid down in Stubbs *v.* Holywell Ry. Co.[2]; that in the case of contracts falling directly within the rule of Taylor *v.* Caldwell[3] the subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed.[4]

INTERNATIONAL PAPER COMPANY, Respondent, *v.* WILLIAM ROCKEFELLER, Appellant

New York Supreme Court, Appellate Division, March 4, 1914

[*Reported in* 161 *New York Appellate Division,* 180]

Kellogg, J.: The action is brought to recover damages on account of the failure of the defendant to deliver pulp wood as agreed. The agreement between the parties, dated July 5, 1899, "*Witnesseth:* That Whereas, William G. Rockefeller has entered into a contract with the Kingsley Lumber Company, dated June 9, 1899, for the purchase of certain timber lands and property in Franklin County,

[1] 3 B. & S. 826.
[2] (1867) L. R. 2 Ex. 311.
[3] 3 B. & S. 826.
[4] The statement of facts has been abbreviated and short concurring opinions of Romer and Stirling, L.JJ. have been omitted.

New York, therein more particularly described, and has assigned the same to the party of the first part.

"And WHEREAS, the party of the second part is desirous of purchasing wood now on said lands from the party of the first part, which the latter is willing to sell if he acquires the title to the said lands under the said contract.

"*Now, therefore,* the parties hereto, in consideration of the premises, and of the sum of one dollar by each to the other in hand paid," etc.

It then provides that if the defendant acquires the land he agrees to sell and deliver on the cars, at the mills of the plaintiff at Cadyville, during the year 1899, 6,000 cords of wood, and during each of the next five years from January 1, 1900, to January 1, 1905, not less than 10,000 cords of woods per year, with the right to the plaintiff to require an additional amount in any year, not to exceed 2,000 cords, by giving the notice required. The wood was to be cut from live spruce trees. Deliveries for the year 1889 were to commence not earlier than October first and continue on an average of about 1,000 cords a month "after connection has been established by the Chateaugay Railroad Company." In the successive five years deliveries were to be on the average about 800 to 1,000 cords of wood a month, commencing January 1, 1900. The plaintiff agreed "to purchase and accept the said wood as hereinbefore provided, and to pay for the same" five dollars and fifty cents per cord.

The defendant did not in any year deliver the amount of wood stated. In 1899 no wood was delivered. In 1900 there was a deficiency of 4,956.75 cords; in 1901 of 5,679.86 cords; in 1902 of 5,597.75 cords; in 1903 of 7,999.01 cords; in 1904, giving credit for the deliveries after that year, the deficiency was 3,511.87 cords. The defendant has in fact delivered not quite one-half the amount of wood required. In the year 1903, the particular time of year not appearing, more than one-half of the lands referred to in the contract, the part not cut, was burned over and substantially all the spruce killed by fire. Aside from the wood delivered to the plaintiff there remains about 550 cords upon the top of the high mountain which could have been cut and furnished as pulp wood, but the expense of obtaining and delivering it would have been about twenty dollars a cord.

The contract having been executed under seal, the plaintiff's remedy is not barred by the Statute of Limitations. The defendant having defaulted in delivering the wood at Cadyville, the measure of damages was the difference between the contract price and the price at which wood could be purchased or procured at Cadyville. It is evident that there was no market at or near Cadyville at which the large quantities of wood required to fulfill the contract could be bought, and it became necessary to purchase a part of

it in Canada, which apparently was the next most favorable market. The charge placed the matter of damages before the jury in a manner not prejudicial to the defendant. The defendant was entitled to show his understanding at the time he executed the contract, of the amount of green spruce upon the tract. This might have a bearing upon the interpretation of the contract, and might explain the fact that some spruce from the tract, during the continuance of the contract, was sold to others.

The difficulty arises with reference to the contention of the defendant that the destruction of the green spruce by fire excused him from making deliveries thereafter. Clearly he is liable for all deficiencies occuring prior to the fire. The contract was made under the following circumstances: In 1899 the De Bar mountain tract, containing about 16,000 acres, belonging to the Kingsley Lumber Company, was for sale. It was woodland, with a large quantity of growing spruce. It was connected by a spur with the New York Central railroad, a broad-gauge road, and near the Central railroad at that point was the Chateaugay railroad, a narrow-gauge road. From the lands to the Cadyville mill by the Central road was a long and circuitous route; by the Chateaugay road it was substantially a direct line. The accessibility of woodland to a railroad connection, and the freight charges, are an important element in furnishing pulp wood to a given mill. The defendant owned other spruce lands in Franklin county, upon which no lumbering was being done except the cutting and marketing of wood which had been killed by fires. These lands were about 30 miles away in an air line, about 100 miles by rail, and lumbering from them for the Cadyville mill would make necessary the transfer of pulp wood from a broad-gauge to a narrow-gauge car in order to use the Chateaugay road; otherwise it would be necessary to carry it a much greater distance.

One Hibbard applied to the plaintiff in 1899, informing it that he was contemplating purchasing the Kingsley lands, and proposed a pulp wood contract. Negotiations proceeded between them which finally resulted in the contract in question, which was prepared by Hibbard and was executed by the defendant and the plaintiff. The defendant had nothing to do with the plaintiff in the making of the contract and had made no examination of the property. Hibbard was supposed to have an interest in the De Bar mountain tract, and was to take charge of the management of it and the getting out of the pulp wood. He was to receive one-third of the profit and the defendant two-thirds in addition to interest upon his investment. It does not appear that Hibbard and the defendant had any other relations except with reference to these lands, or that Hibbard was interested in any other pulp wood or pulp wood lands. The lands upon which green spruce was growing in the territory fairly tributary to Cadyville were owned principally by the State as a part of the Forest Preserve, by the plaintiff and by parties with

whom the plaintiff had outstanding contracts. Apparently, aside from the Kingsley lands, there were no other lands from which the large quantity of pulp wood agreed to be furnished by the contract could be supplied by defendant in the territory naturally tributary to the Cadyville mill by the Chateaugay railroad.

The contract by its terms is conditional upon the defendant's acquiring the Kingsley lands, but the plaintiff contends it is a reasonable inference that if the defendant acquired the Kingsley lands he was then willing to contract absolutely for the delivery of the wood and that the contract absolutely does not show that the wood was to be taken from these lands.

While not free from doubt, it seems to me that it was contemplated that the wood to be furnished was to be cut on the Kingsley lands. The statement that the plaintiff was desirous of purchasing the wood now on the lands and that the defendant was willing to sell it if he acquired the lands; the fact that the contract was conditional upon the purchase and that the first deliveries in 1899 were dependent upon the connection with the Chateaugay road which came within a very short distance but would not immediately serve any other wood lands, and the fact that Hibbard was the moving spirit in the matter, was understood to be the party getting out the wood and apparently had no other relations with the defendant than in lumbering this tract, indicate that the parties had in mind, in making the contract, the lumbering of this tract. We need not say that the defendant could not have furnished live wood of equal quality from other lands, but the contract, read in connection with the known facts, shows the source from which the parties contemplated the wood should be furnished, and when the source is destroyed the defendant is excused from further performance. The defendant did not contract to deliver the wood unless he acquired the Kingsley lands. If all the wood upon the Kingsley lands had been destroyed by fire immediately after the contract was executed, the parties would have been in substantially the same position they would have occupied if the defendant had not acquired the lands. The real reason which induced the contract and upon which it depended would have failed.

In an undated letter from Hibbard to the defendant, which was apparently received about December 26, 1899, he refers to the contract as one "for wood from the De Bar Mountain tract for the Cadyville Mill." On October 22, 1901, the plaintiff wrote to the defendant complaining that some spruce logs had been sold from the lands, and continued: "We entered into the agreement with Mr. Hibbard with the understanding that we were to have all the spruce wood on this land, although it was not specifically stated that he should not take a small quantity of same for timber purposes. To the best of my judgment, you will not have on this land any more spruce wood than the contract calls for. I simply call this matter to

your attention thinking possibly you do not really understand the conditions of the contract as they are being carried out by your representative."

Under all the circumstances it must be considered that the deliveries of the pulp wood from time to time were conditional upon the continued existence of the green spruce upon the lands not cut over. (Buffalo & L. Land Co. *v.* Bellevue L. & I. Co., 165 N. Y. 247; Dexter *v.* Norton, 47 id. 62; Dolan *v.* Rodgers, 149 id. 489; Herter *v.* Mullen, 159 id. 28.)

We do not know what time in 1903 the fire occurred, nor what the jury determined the damages per cord were during the respective years. We cannot, therefore, modify the judgment by apportioning the damages and excusing the defendant for a failure to deliver wood after the fire. The defendant is not excused from delivering the live spruce suitable for pulp wood which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive for him to deliver it.

The judgment and orders are reversed upon the law and the facts and a new trial granted, with costs to the appellant to abide the event. *All concurred.*

Judgment and orders reversed on law and facts and new trial granted, with costs to appellant to abide event. The findings that the defendant agreed unconditionally to deliver all the pulp wood mentioned in the contract, and that the plaintiff has suffered damages in the amount of $48,000, are reversed as against the evidence, and the findings are made that considering the circumstances under which the contract was made the deliveries of wood from time to time were conditional upon the continued existence of the green spruce upon the Kingsley lands not cut over, and that in 1903 the spruce growing upon said lands was substantially destroyed by fire, and that the evidence does not show that the destruction of said spruce was caused by the negligence or fault of the defendant.

ALFRED MARKS REALTY COMPANY, Respondent, *v.* HOTEL HERMITAGE COMPANY, Appellant

New York Supreme Court, Appellate Division

[*Reported in* 170 *New York Appellate Division,* 484]

Putnam, J.: This appeal is from an affirmance of a judgment for plaintiff. In January, 1914, defendant contracted with plaintiff's assignor, the International Yacht Publishing Company, for insertion of its advertisement in a "Souvenir and Program of International Yacht Races," for which defendant agreed to pay "upon publication and delivery of one copy of the same."

These books, priced at twenty-five cents, were to serve as an advertising medium. In the early part of August some of the

books were printed and bound with defendant's hotel advertisement opposite the picture of a yacht. About 2,500 copies at twenty-five cents each were sold and distributed, and about 400 or 500 copies placed on newsstands for sale.

About August fifteenth or seventeenth the yacht club committee having charge of the races (in which this publication company had no voice or control) declared the same off, because of the war. The challenger, *Shamrock IV,* did not arrive till August twentieth, and at this time three American yachts were having trials to ascertain which should be chosen to defend the cup in the September races.

On August twenty-fifth plaintiff's assignor wrote defendant that a sample copy of souvenir and program of the international yacht races, with defendant's advertisement inserted therein, had been mailed. "As you are no doubt aware the cup races have been postponed until 1915 on account of European disturbances. Even with out the races the book as a souvenir is a good seller and a good advertisement. We expect an unprecedented sale before and after the races. Many of which (*sic*) have already subscribed for cash in advance. We claim it is the best book ever for the price. The work will be placed on public sale later. Kindly remit us your check."

Obviously defendant and the publishing company had in view the September cup racing. Defendant's advertisement was in connection with this contest. A program is for events to which it relates, and a souvenir "cannot recall what has not taken place." (Marks Realty Co. *v.* "Churchills," 90 Misc. Rep. 370.) The issue of the exhibit here, though styled program and souvenir, was anticipatory. Such an issue and sale for the convenience of plaintiff's assignor, is not a "publication" in the sense of this contract. A condition is implied of two contestants being named for the time and place of a race; and where this feature is obvious, a failure, by giving up the expected contests, abrogates the contract. (Lorillard *v.* Clyde, 142 N. Y. 456, 463.)

This is not where a promisor has failed to guard himself against a *vis major.* It is not a performance on one side, the other having no appropriate clause to excuse default. But it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise. An advance issue of the programs cannot fairly be held to be what defendant was to pay for. The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment.

The order of the Appellate Term should be reversed, and the judgment of the Municipal Court for plaintiff reversed, with costs of the appeals, and the complaint dismissed, with costs.

Jenks, P. J., Carr, Mills and Rich, JJ., concurred.

Order of the Appellate Term reversed, and judgment of the Municipal Court for plaintiff reversed, with costs of the appeal, and complaint dismissed, with costs.

BLACKBURN BOBBIN COMPANY LTD. *v.* T. W. ALLEN & SONS, LTD.

IN THE KING'S BENCH DIVISION, February 5–12, 1918

[*Reported in* [1918] 1 *King's Bench,* 540]

By the contract made in the early part of 1914 the defendants sold to the plaintiffs timber to be imported from Finland and to be delivered to the plaintiffs free on rail at Hull, deliveries to commence in June or July, 1914, and to continue during the season which would terminate in November. The contract did not contain the exceptions of war or force majeure. The practice before the war was to load timber into vessels at ports in Finland for direct sea carriage to England, but this practice was not known to the plaintiffs, nor did they know, as the fact was, that timber merchants in England do not keep Finland timber in stock. Up to the outbreak of the war in August, 1914, the defendants had not delivered any of the timber, and after that date, owing to the disorganization of transport caused by the war, it became impossible for the defendants to obtain any Finland timber for delivery to the plaintiffs, and the defendants contended that the contract had been dissolved by the outbreak of war:—

MCCARDIE, J. It is obvious that the principle raised by the case is one of vital and general importance. The question at issue is this: When will a change of circumstances (not due to the default of either party) cause a dissolution of contract? The law upon the matter is undoubtedly in process of evolution: see per Atkin J. in Lloyd Royal Belge Societe Anonyme *v.* Stathatos [1] and per Pickford L. J. in Hulton & Co. *v.* Chadwick & Taylor.[2] The point must presumably be solved upon broad existing principles of contract law. Those principles, I conceive, should be the same whether the case be one of charterparty, building contract, or sale of goods: see per Lord Loreburn in the Tamplin Case.[3] But the application of the principles may vary with the terms and subject-matter of the contract. Is there a conflict at the present time between the rules which are relevant to the present case? The original rule of English law was clear in its insistence that where a party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; see per Curiam, Paradine *v.* Jane.[4] That principle was applied with full severity during the eighteenth century. I need not discuss the decisions in detail; many are referred to in Leake on

[1] (1917) 33 Times L. R. 390.
[2] (1918) 34 Times L. R. 230.
[3] [1916] 2 A. C. 397, 404.
[4] (1647) Aleyn, 26.

Contracts, 6th ed., pp. 494–498. In some of those cases there was clearly a grave change of circumstances not within the contemplation of the parties at the time of the contract, yet it was held that no dissolution of contractual obligation took place. I mention the decisions referred to in Leake because it is, I think, essential to remember them if the pending evolution of principle proceeds. The original rule has again and again been restated. I only refer to Spence *v.* Chadwick,[1] per Wightman J., and to Ford *v.* Cotesworth,[2] per Blackburn J. To what extent has the original rule been modified by later decision? I do not think that the decision in Esposito *v.* Bowden[3] is revelant to the question, for the contract was there dissolved by reason of the absolute prohibition of commercial intercourse with an enemy. I doubt, moreover, if Baily *v.* De Crespigny[4] is a true modification of the doctrine. For there an Act of Parliament took away from both parties the subject-matter of the contract. The rights of each were destroyed and nothing was left upon which the contract could operate. There was more than a change of circumstance; there was a statutory seizure of the contract property. But the judgment of the Court undoubtedly rested to some extent on the principle of dissolution by a complete change of circumstance, and this view has apparently been approved by Lord Parmoor in Metropolitan Water Board *v.* Dick, Kerr & Co.[5] The first true modification of the original rule was created, I think, by the doctrine of commercial frustration. I need not review the decisions on this doctrine; they are fully and historically considered in the judgments, both in the Common Pleas and the Exchequer Chamber, in Jackson *v.* Union Marine Insurance Co.[6] The effect of the decision is best stated by Brett, J.[7] as follows: "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." If these words of Brett J. are to be applied to their widest extent they may well effect a revolution of contract law. It has been pointed out by Lord Loreburn that the rule stated in Jackson *v.* Union Marine Insurance Co.,[6] is a mere application to commercial adventures of a broad contractual principle: see the Tamplin Case.[8] The next true modification of the original rule was finally effected by the decision in Taylor *v.* Caldwell.[9] There the con-

[1] (1847) 10 Q. B. 517, 530.
[2] (1868) L. R. 4 Q. B. 127, 133.
[3] (1857) 7 E. & B. 763.
[4] (1869) L. R. 4 Q. B. 180.
[5] [1918] A. C. 119, 140.
[6] (1873) L. R. 8 C. P. 572; (1874) L. R. 10 C. P. 125.
[7] L. R. 8 C. P. 581.
[8] L. R. 10 C. P. 125.
[9] [1916] 2 A. C. 401.

tract was held dissolved by the destruction of its subject-matter. The doctrine of Taylor *v.* Caldwell[1] was extended by Nickoll & Knight *v.* Ashton, Eldridge & Co.,[2] and still more strikingly enlarged by the Coronation cases, of which Krell *v.* Henry[3] is the most vivid example, for in Krell *v.* Henry[3] the Court held that a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased it followed that the contract was dissolved. Krell *v.* Henry has been frequently cited and adopted in the highest tribunal.

So stood the decisions at the outbreak of the present war. Since that event judgments have been delivered as to the true effect of the decisions I have stated. On the one hand the original rule has been stated to exist in its integrity, whilst on the other hand the modification of the rule is deemed to be clearly settled: see per Lord Wrenbury in Horlock *v.* Beal.[4] The explanation of the lines of cases represented (*a*) by Jackson *v.* Marine Union Insurance Co.,[5] and (*b*) by Krell *v.* Henry[3] has been finally and authoritatively stated. It was put with clearness by Lord Shaw in Horlock *v.* Beal,[6] where he said: "The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties." It was stated with equal clearness by Lord Haldane in the Tamplin Case[7] where he said: "The occurrence itself may . . . . be of a character and extent so sweeping that the foundation of what the parties are deemed to have in contemplation has disappeared, and the contract itself has vanished with that foundation." In every case it is now necessary "to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract:" per Lord Loreburn in the Tamplin Case.[8] It is obvious that what I will call the Krell *v.* Henry[3] rule as now formulated is theoretically capable of application to all contracts, whether as between shipowner and seamen, as in Horlock *v.* Beal,[9] or to building contracts, as in Metropolitan Water Board *v.* Dick, Kerr & Co.[10]

But by what tests and subject to what limitations is the Krell *v.* Henry[3] rule to be applied? No indication has yet been given as to the extent of its operation. At the outbreak of war a vast body of commercial contracts existed which contained no clauses whatever

[1] 3 B. & S. 826.
[2] [1901] 2 K. B. 126.
[3] [1903] 2 K. B. 740.
[4] [1916] 1 A. C. 486, 525.
[5] L. R. 10 C. P. 125.
[6] [1916] 1 A. C. at p. 512.
[7] [1916] 2 A. C. 406, 407.
[8] *Ibid.*, at p. 403.
[9] [1916] 1 A. C. 486.
[10] [1918] A. C. 119.

providing for that event. No one can doubt that such contracts had been made upon the assumption that peace would continue. Neither side contemplated the occurrence of war. But it cannot be that all such contracts were dissolved by the events of August, 1914. The mere continuance of peace was not a condition of the contract: see per Loreburn in the Tamplin Case.[1] The description of a state of peace is not of itself a destruction of any specific set of facts within the Krell *v.* Henry[2] rule. Nor can it be that grave difficulty on the part of a vendor in procuring the contract articles will excuse him from the performance of his bargain. If such were the case, then the decision of the House of Lords in Tennants (Lancashire) *v.* Wilson & Co.,[3] with respect to the force majeure clause there in question would have been unnecessary, for the contract would have been dissolved by a basic change of circumstances and the principle of Metropolitan Water Board *v.* Dick, Kerr & Co.,[4] would have applied.

What, then, are the limits of the Krell *v.* Henry[2] rule as most recently exemplified by the last-named case, Metropolitan Water Board *v.* Dick, Kerr & Co.?[4] At the same time I deem it well to ask this further question: Have the recent decisions in the House of Lords impliedly overruled the judgment of the Court of Appeal in Jacobs, Marcus & Co. *v.* Crédit Lyonnais?[5] There the defendants, a London firm, sold to the plaintiffs, London merchants, 20,000 tons of Algerian esparto to be shipped by a French company at an Algerian port on vessels to be provided by the plaintiffs. The defendants pleaded that performance of their contract had become impossible by reason of an insurrection in Algeria, and a consequent prohibition by the territorial Government of the collection and transport of esparto. It was held by the Court of Appeal (Brett M. R. and Bowen L. J.), affirming Manisty and Denman JJ., that such plea afforded no answer to the plaintiff's claim for damages. The pith of the case was put by Brown L. J.[6] "Now, one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one,) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major. 'The rule laid down in the case of Paradine *v.* Jane[7] has,' says Lord Ellenborough, 'been often recognized in Courts of law as a sound one; i. e., that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.'"[8] See also Spence

[1] [1916] 2 A. C. 405.
[2] [1903] 2 K. B. 740.
[3] [1917] A. C. 495.
[4] [1918] A. C. 119.
[5] 12 Q. B. D. 589.
[6] *Ibid.*, at p. 603.
[7] Aleyn, 26, 27.
[8] Atkinson *v.* Ritchie (1809) 10 East, 530, 533.

v. Chadwick;[1] Lloyd *v.* Guibert.[2] If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an expressed or implied intention to that effect, be contrary to authority as well as principle, see Barker *v.* Hodgson;[3] Sjoerds *v.* Luscombe."[4] The change of circumstances in Jacobs' Case[5] was serious and clearly was not foreseen by the parties. See also Ashmore *v.* Cox, per Lord Russell of Killowen C. J.[6]

To supply an answer to the above questions is a task of great difficulty in the absence of any authoritative guidance, for it calls not only for a reconciliation of apparently conflicting lines of cases, but it calls also for the ever-embarrassing duty of deciding whether an implied term shall be read into a given contract to the effect that dissolution shall take place if an uncontemplated and serious change of circumstances occurs. The decisions with respect to personal services throw, I feel, but little light on the matter, for it seems just and reasonable to imply a condition in such agreements that the contract shall be dissolved upon the death or physical incapacity of the person who has agreed to give his personal services: see Robinson *v.* Davison.[7] Death and illness are unceasing features of human society. I think, however, that assistance is derived from considering broadly the nature of the cases in which the Krell *v.* Henry[8] rule has been applied, whether before or after that decision in 1903. It will be observed that they apparently fall into several classes: First, where British legislation or Government intervention has removed the specific subject-matter of the construction from the scope of private obligation (Bailey & DeCrespigny[9] is a good example of this class: see also *In re* Shipton, Anderson & Co., and Harrison Brothers & Co.,[10] the case of specific goods. I myself venture to think that this is an independent class of case, though, for the purpose of clearness, I classify it as falling within Krell *v.* Henry[8]); secondly, where the actual and specific subject-matter of the contract has ceased to exist, apart from British legislation or administrative intervention. (Taylor *v.* Caldwell[11] is the best example of this class; Horlock *v.* Beal[12] is really, I think, a further example of this class); thirdly, where a specific set of facts directly affecting a specific subject-matter has ceased to exist (see Jackson *v.* Union Marine Insurance Co.,[13] the case of a ship, and Scottish Navigation Co. *v.* Souter & Co.,[14] also the case of a ship);

[1] 10 Q. B. 517, 530.
[2] L. R. 1 Q. B. 115, 121.
[3] 3 M. & S. 267.
[4] 16 East, 201.
[5] 12 Q. B. D. 589.
[6] [1899] 1 Q. B. 436.
[7] L. R. 6 Ex. 269.
[8] [1903] 2 K. B. 740.
[9] L. R. 4 Q. B. 180.
[10] [1915] 3 K. B. 676.
[11] 3 B. & S. 826.
[12] [1916] 1 A. C. 486.
[13] L. R. 10 C. P. 125.
[14] [1917] 1 K. B. 222.

fourthly, where a specific set of facts collaterally only affecting a specific subject-matter, but yet constituting the basis of contract, has ceased to exist (see Nickoll & Knight *v.* Ashton, Eldridge & Co.,[1] the case of a ship, and Krell *v.* Henry,[2] the letting of specific premises); and, fifthly, where British administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated conditions of performance (Metropolitan Water Board *v.* Dick, Kerr & Co.[3]). I need not, of course, classify or illustrate the cases in which British legislation has directly prohibited the performance of a contract. In such cases the doctrine of illegality dissolves the bargains: see Brewster *v.* Kitchell.[4] In none of the cases in the above classes has it been stated or substantially suggested that the principle of Krell *v.* Henry[2] applies to the case of a bare sale of unascertained goods. The illuminating judgment of Scrutton L. J. in Metropolitan Water Board *v.* Dick, Kerr & Co.,[5] seems throughout to be dealing with specific subject-matter.

But the above classification, imperfect as I fear it is, does not exhaust the decisions which call for consideration, and here I must point out that in not a few of the decisions since the outbreak of the war the question of trading with the enemy has crept directly or indirectly into the determination of the matters in dispute. The doctrine of prohibition against any intercourse whether commercial or otherwise, with an enemy subject, is severe and far-reaching. I need only refer to Esposito *v.* Bowden,[6] Zinc Corporation *v.* Hirsch,[7] Robson *v.* Premier Oil and Pipe Line Co.,[8] and Ertel Bieber & Co. *v.* Rio Tinto Co.,[9] in the House of Lords. It is important to remember this point in approaching the cases which I next mention. Such cases apparently deal with a sale of unascertained goods. They are as follows: — (a) Jager *v.* Tolme & Runge[10] (Court of Appeal). The facts of this case were complicated, but the substance of the matter was that the vendors had agreed to deliver sugar f. o. b. Hamburg in August, 1914. The parties were British. The Courts held that the contract was dissolved by the outbreak of war. In my opinion, however, it is clear that the ratio of the decision was that performance of the contract would be illegal inasmuch as it would involve commercial intercourse with the enemy. The Court of Appeal ignored the expressly-raised contention that the contracts had been dissolved on the principle of Krell *v.* Henry.[2] The case of Grey & Co. *v.* Tolme[11] was decided by Bailhache J. on the same ratio. (b) Smith, Coney & Barrett *v.* Becker, Gray & Co.[12]

[1] [1901] 2 K. B. 126.
[2] [1903] 2 K. B. 740.
[3] [1918] A. C. 119.
[4] 1 Salk. 198.
[5] [1917] 2 K. B. 28, 29.
[6] 7 E. & B. 763.
[7] [1916] 1 K. B. 541.
[8] [1915] 2 Ch. 124.
[9] [1918] A. C. 260.
[10] [1916] 1 K. B. 939.
[11] 31 Times L. R. 551
[12] [1916] 2 Ch. 86.

Here, again, the facts were complicated. The parties were British firms. The vendors had agreed on August 1, 1914, to sell sugar f. o. b. or into warehouse Hamburg. In view of the special provisions in the contract the Court held that the contract was not dissolved. Had it held otherwise, I venture to think that the true ratio would again have been that performance would have involved trading with the enemy. But it is right to say that although the majority of the Court (Lord Cozens-Hardy M. R. and Swinfen Eady L. J.) did not apparently favour the application of the Krell *v.* Henry [1] rule, yet Phillimore L. J. seems to have thought that it might apply under certain circumstances—for instance, if the sugar had been wholly destroyed by fire. The point does not seem to have been fully argued, and such cases as Jacobs, Marcus & Co. *v.* Crédit Lyonnais [2] were not brought to the attention of the Court. (c) Hulton & Co. *v.* Chadwick & Taylor.[3] The facts in this decision more closely approach the facts of the present case. It was recognized by Pickford L. J. that the principle of dissolution of contract by change of circumstances had been largely extended in operation. But I respectfully suggest that the true ratio of the decision of the Court of Appeal is to be found not so much in the change of circumstance, though serious in extent, as in the fact that an administrative intervention of the British Government had in substance prevented the fulfilment of the contract by the vendor in accordance with his obligations. Hulton & Co. *v.* Chadwick & Taylor [3] represents, in my view, an extension of the principle of Brewster *v.* Kitchell [4] or Baily *v.* DeCrespigny [5] rather than a true extension of the broader principle of Krell *v.* Henry.[1] The former principle is one which admits of many applications in these days of administrative intervention, and in some cases the facts may be covered as much by Krell *v.* Henry [1] as by Baily *v.* DeCrespigny.[5] The principles may overlap. The rule contended for by Mr. MacKinnon must have applied, if at all, as much to that case as to the present, for there had been in Hulton's Case [3] a revolution of circumstance, yet it is clear that Pickford L. J. rested his judgment on administrative intervention, that is to say, on Baily *v.* DeCrespigny,[5] rather than on the application of the Krell *v.* Henry [1] rule.

My conclusion upon the matter is that in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of Krell *v.* Henry,[1] even though there has been so grave and unforseen a change of circumstance as to render it impossible for the vendor to

[1] [1903] 2 K. B. 740.
[2] 12 Q. B. D. 589.
[3] 34 Times L. R. 230.
[4] 1 Salk. 198.
[5] L. R. 4 Q. B. 180.

fulfill his bargain. If I were to hold otherwise, I should create a rule the results of which no man can foresee, and to the operation of which no judge can satisfactorily fix the limits.

By stating the above conclusion I maintain the original rule of English law whereby a man is bound by his contract whilst I leave a field as yet undefined for the operation and extension of the Krell v. Henry [1] principle. I am fortified in the view I express by the fact that Jacobs, Marcus & Co. *v.* Crédit Lyonnais [2] has remained unchallenged amidst the testing breadth of recent decisions. I can see no sound distinction between impossibility of foreign law and impossibility created by an outbreak of war involving a complete cessation of transport facilities. Just as it seems clear that a vendor is not absolved from the duty to deliver unascertained goods by reason of the destruction of his factory or warehouse, so a vendor is not relieved from his obligation in such a case as the present. An ordinary and bare contract for the sale of unascertained goods gives no scope for the operation of the Krell *v.* Henry [1] rule, unless the special facts show that the parties have clearly (though impliedly) agreed upon a set of circumstances as constituting the contractual basis. Here no such agreement exists. In the present case, I ask the question put by Denman L. in Jacobs, Marcus & Co. *v.* Crédit Lyonnais: [3] "Looking at the nature of this contract, what is there to show that the intention of the parties was that the defendants should be relieved from the performance of their contract by reason of difficulties arising out of circumstances which were unforeseen?" My answer in the present case is that there is nothing to show such an intention. There is here no question of illegality or public policy, of actual prohibition or of intervention by the Government. There is merely an unforeseen event which has rendered it practically impossible for the vendor to deliver. That event the defendants could easily have provided for in their contracts. If I approved the defendant's contention, I should be holding in substance that a contract which did not contain a war clause was as beneficial to the vendor as a contract which contained such a provision.

In my view the rule in Jacobs, Marcus & Co. *v.* Crédit Lyonnais [2] holds good today, and I think that it covers the present case. I desire respectfully to add that in my opinion the Krell *v.* Henry [1] rule should not be unduly extended. It is only in exceptional cases that it can be safely applied. The difficulties of its application are amply indicated by the judgment of the Court of Appeal in Herne Bay Steam Boat Co. *v.* Hutton [4] and by actual decision of the majority of the Law Lords in the Tamplin Case.[5] The perils of

[1] [1903] 2 K. B. 740.
[2] 12 Q. B. D. 589.
[3] *Ibid.* 597.
[4] [1903] 2 K. B. 683.
[5] [1916] 2 A. C. 397.

the rule may appear in later years. If it be extended too far, it may tend to sap the foundations of contract law as they now exist. It is, I venture to say, of the utmost importance to a commercial nation that vendors should be held to their business contracts. When a change of circumstance is to absolve from liability, provision to that effect should be inserted in the bargain. If I pronounced in favour of the defendants I should be giving a decision of a legislative rather than judicial character, and I might well be rendering superfluous in many cases the provisions contained in the Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. V, c. 25).

I may mention that in the present case I am satisfied that the plaintiffs were unaware at the time of the contract of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull. They did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that the timber merchants in this country did not hold stocks of Finnish larch.

I decide against the first contention of the defendants.

I now consider the second point raised before me. The defendants submitted that the case was covered by the Courts (Emergency Powers) Act, 1917, and that I should annul the contract upon suitable terms by virtue of s. 1, sub-s 1, of that Act. The sub-section enables application to be made to the Court by any party to "a contract for the construction of any building or work or for the supply of any materials for any building or work entered into before August 4, 1914." In my opinion the sub-section has no application to the present case. The keynote of the words I have read is "construction." The sub-section only applies to the cases (a) of an ordinary building contract; (b) a contract for the construction of some work which in substance resembles a building contract, as, for instance, the laying of a water system, the making of a bridge or the like; and (c) to the supply of materials for a contract which falls within either (a) or (b). The wording of the sub-section is narrow. Its operation is restricted. In my view it cannot apply to a contract for the supply of timber to be used for the making of bobbins for spinning mills. Sub-s. 2 of s. 1 of the Act and s. 3 of the Act apply to contracts generally. But sub-s. 1 of s. 1 deals with a particular and limited body of contracts, and with respect to such contracts only can the Court give relief if the circumstances exist which are indicated in the sub-section. The second point raised by the defendants therefore fails also.

I must now deal with the question of damages, and here I must state a few further facts. On August 6, 1914, the plaintiffs wrote to the defendants the following letter: "Sirs,—How are you situated with reference to the birch squares on order for us? We want a truck of 1⅛ inch and 1 1-16 inch mixed very badly." Thereupon the defendants replied as follows on August 7: "Dear Sirs,—We

have your favour of yesterday and regret we have no prospect at present of being able to supply your requirements owing to the war. If our fleet is able to clear the seas, both the Baltic and the North Sea, of the German warships we may hope to see steamers again running to Finland, and in that case we may be able to supply you." I accept the evidence of Mr. Dawson, the plaintiffs' managing director, that upon receipt of that letter he assumed that the defendants would supply when they could. I also accept his evidence that the plaintiffs were willing to extend the defendants' time for the delivery of the timber. Hence he did not reply to the letter of August 7, 1914. In November, 1914, a few letters passed between the parties with respect to a possible supply to the plaintiffs of some Finland birch by one of the defendants' customers. But nothing came of the suggestion. From November, 1914, to 1916, the plaintiffs were waiting. Then they heard that Finnish timber was being imported into this country. Apparently arrangements had been made for shipments to Sweden, thence by rail to Norway or across Sweden, and thence again by shipment from a Scandinavian port to England. Hence they wrote to the defendants on July 31, 1916, and explained that they had been patiently waiting for delivery and that they needed a supply. Thereupon the defendants wrote on August 1, 1916, that all pre-war contracts were cancelled by the war. The defendants, however, offered to supply a certain shipment at 26*l.* per standard, and they made a similar offer by letter of August 3, 1916. The plaintiffs claim as damages the difference between 10*l.* 15*s.*, the contract price, and the sum of 26*l.* per standard, which clearly represents the price in August, 1916. The defendant sold all their imports of the Finnish birch in 1918 at that figure. The defendants argued, however, that the damages should be assessed as in November, 1914. But the plaintiffs submitted that the correspondence between the parties, and particularly the letter of August 7, 1914, amounted to a request by the defendants for an extension of time for delivery, and that this request was assented to by the plaintiffs. If this be so, then the principle of Ogle *v.* Earl Vane[1] applies. Upon consideration I am of opinion that the plaintiffs are right in their submission. Upon the facts and documents in this case. I think the proper business conclusion to draw is that the defendants requested the plaintiffs to extend the time for delivery. I have considered the judgments in Ogle *v.* Earl Vane,[1] and in my view they cover the present case.

I therefore hold that the plaintiffs are entitled to recover as damages the difference between 10*l.* 15*s.* and 26*l.* per standard. Even if I had taken November, 1914, as the date of assessment, as suggested by the defendants, I should, in spite of the ingenious arguments of Mr. Jowitt, have arrived at the same sum as damages, for in the absence of Finland birch the plaintiffs are entitled to do

[1] L. R., 3 Q. B. 272.

the best they could under the principle of Hinde *v.* Liddell.[1] They bought English timber, which is far less pliable than Finnish birch, and which involves far more expense and also far more waste in cutting.

After a careful consideration of the whole of the complex and detailed evidence upon the point and the arguments of counsel thereon, I have come to the conclusion that the plaintiffs' damages would not be less if assessed in November, 1914, than if assessed in August or September, 1916.

I therefore give judgment for the plaintiffs for 1067*l.* 10*s.* with costs.[2] *Judgment for plaintiffs.*

[1] L. R. 10 Q. B. 265.

[2] The statement of facts has been abbreviated. The decision was affirmed by the Court of Appeal in [1918] 2 K.B. 467.

CHAPTER VI

ILLEGAL CONTRACTS

SECTION I

CONTRACTS IN RESTRAINT OF TRADE

MITCHELL *v.* REYNOLDS

IN THE KING'S BENCH, HILARY TERM, 1711

[*Reported in* 1 *Peere Williams,* 181.]

DEBT upon a bond. The defendant prayed oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's Halborn, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. *Quibus lectis* and *auditis,* he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quad* he did trade, *prout ei bene licuit.* Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, PARKER, C. J., delivered the resolution of the court.

The general question upon this record is, whether this bond, being made in restraint of trade, be good?

And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the fame is good; and that the true distinction of this case is, not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place: for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavor to state the law upon this head, and to

reconcile the jarring opinions; in order whereunto, I shall proceed in the following method.

1st, Give a general view of the cases relating to the restraint of trade.

2dly, Make some observations from them.

3dly, Show the reasons of the differences which are to be found in these cases; and

4thly, Apply the whole to the case at bar.

As to the cases, they are either first, of involuntary contracts, against, or without, a man's own consent; or secondly, of voluntary restraints by agreement of the parties.

Involuntary restraints may be reduced under these heads.

1st, Grants or charters from the crown.

2dly, Customs.

3dly, By-laws.

Grants or charters from the crown may be,

1st, A new charter or incorporation to trade generally, exclusive of all others, and this is void. 8 Co. 121.

2dly, A grant to particular persons for the sole exercise of any known trade; and this is void, because it is a monopoly, and against the policy of the common law, and contrary to Magna Charta. 11 Co. 84.

3dly, A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1, cap. 3, sect. 6, to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.

Restraints by custom are of three sorts.

1st, Such as are for the benefit of some particular persons, who are alleged to use a trade for the advantage of a community, which are good. 8 Co. 125; Cro. Eliz. 803; 1 Leon. 142; Mich. 22 H. 6, 14; 2 Bulst. 195; 1 Roll. Abr. 561.

2dly, For the benefit of a community of persons who are not alleged, but supposed to use the trade, in order to exclude foreigners. Dyer, 279, b; W. Jones, 162; 8 Co. 121; 11 Co. 52; Carter, 68, 114, held good.

3dly, A custom may be good to restrain a trade in a particular place, though none are either supposed or alleged to use it; as in the case of Rippon. Register, 105, 106.

Restraints of trade by by-laws are these several ways.

1st, To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty. Carter, 68, 114; 8 Co. 125. But where there is no precedent custom, such by-law is void. I Roll. Abr. 364; Hob. 210; 1 Bulst. 11; 3 Keb. 808. But the case in Keble is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2dly, All by-laws made to cramp trade in general, are void. Moor, 576; 2 Inst. 47; 1 Bulst. 11.

3dly, By-laws made to restrain trade, in order to better government and regulation of it, are good, in some cases (viz.), if they are for the benefit of the place, and to avoid public inconveniences, nuisances, &c. Or for the advantage of the trade, and improvement of the commodity. Sid. 284; Raym. 288; 2 Keb. 27, 873, and 5 Co. 62, b, which last is upon the by-law for bringing all broadcloth to Blackwell-Hall, there to be viewed and marked, and to pay a penny per piece for marking: this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

In 2 Keb. 308, the case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties, are either,

1st, General, or

2dly, Particular, as to places or persons.

General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade, or not. Cro. Jac. 596; 2 Bulst. 136; Allen, 67.

Particular restraints are either, 1st, without consideration, all which are void by what sort of contract soever created. 2 H. 5, 5; Moor, 115, 242; 2 Leon. 210; Cro. Eliz. 872; Noy, 98; Owen, 143; 2 Keb. 377; March, 191; Show. 2 (not well reported); 2 Saund. 155.

Or 2dly, particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136; Rogers *v.* Parry. Though that case is wrong reported, as it appears by the roll which I have caused to be searched, it is B. R. Trin., 11 Jac. 1, Rot. 223. And there solution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98; W. Jones, 13 Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general, and restraints particular, with or without consideration, which stands upon very good foundation; *Volenti non fit injuria;* a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

Palm. 172; Bragg *v.* Stanner. The entering upon the trade, and not whether the right of action accrued by bond, promise, or covenant, was the consideration in that case.

Vide March's Rep. 77, but more particularly Allen's, 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly, I come now to make some observations that may be useful in the understanding of these cases. And they are,

1st, That to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law.

2dly, That when restrained to particular places or persons (if lawfully and fairly obtained) the same is not a monopoly.

3dly, That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

4thly, That it is lawful upon good consideration, for a man to part with his trade.

5thly, That since actions upon the case are actions *injuriarum,* it has been always held, that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it injuriously.

6thly, That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7thly, That no man can contract not to use his trade at all.

8thly, That a particular restraint is not good without just reason and consideration.

Thirdly, I proposed to give the reasons of the differences which we find in the cases; and this I will do,

1st, With respect to involuntary restraints, and

2dly, With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these, as are created by grants and charters from the Crown and by-laws, generally are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of subject.

2dly, Another reason is drawn from Magna Charta, which is infringed by these acts of power; the statute says, *nullus liber homo,* &c., *disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis,* &c., and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci,* and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, no body can be said to have a right to that which was not in being before, and therefore it is but a reasonable reward to ingenuity and uncommon industry.

I shall show the reason of the differences in the cases of voluntary restraint,

1st, Negatively.

2dly, Affirmatively.

1st, Negatively; the true reason of the disallowance of these in any case, is never drawn from Magna Charta; for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his own pleasure.

2dly, Neither is it a reason against them, that they are contrary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty; as in the case of a covenant not to erect a mill upon his own lands. J. Jones, 13; Mich. 4; Ed. 3, 57. And when any of these are at any time mentioned as reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favor and indulgence of the law to trade and industry.

3dly, It is not a reason against them, that they are against law, I mean, in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense are reducible under one of these heads.

1st, Either to do something that is *malum in se,* or *malum prohibitum;* 1 Inst. 206.

2dly, To omit the doing of something that is a duty. Palm. 172; Hob. 12; Norton *v.* Sims.

3dly, To encourage such crimes and omissions. Fitzherb, tit. Obligation; 13 Bro. tit. Obligation; 34 Dyer, 118.

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer,

1st, That where there may be a way found out to perform the condition, without a breach of the law, it shall be good. Hob. 12; Cro. Car. 22; Perk. 228.

2dly, That all things, prohibited by law, may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a proper sense, as being neither *mala in se,* nor *mala prohibita,* and the law allowing them in some instances, as in those of customs and assumpsits, they may be restrained by condition.

2dly, Affirmatively; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2dly, to the public, by depriving it of an useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually laboring for exclusive advantages in trade, and to reduce it into a few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use

many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

3dly, Because in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action. See Puff.[1] lib. 5, c. 2, sect. 3, 21 H. 7, 20.

4thly, The fourth reason is in favor of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being over-stocked with any particular trade; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

5thly, The law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void. Barrow *v.* Wood, March Rep. 77; Mich. 7 Ed. 3, 65; Allen, 67; 8 Co. 121.

But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

Responsive. I do not see why that should not be shown by pleading; though certainly the law might be settled either way without prejudice; but as it now stands the rule is, that wherever such contract *stat indifferenter,* and for ought appears, may be either good or bad, the law presumes it *prima facie* to be bad, and for these reasons:

1st, In favor of trade and honest industry.

2dly, For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be over-borne by the apparent mischief.

3dly, For that the mischief (as I have shown before) is not only private, but public.

4thly, There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, everybody is affected thereby: for it is to be observed, that

[1] The instances there mentioned are, that if any should agree not to wash their hands, or change their linen, for such a time, there could be no need to trouble a magistrate on the breach of such agreements, which would tend to no consequence when put in execution.

though it be not shown to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason (viz.), as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As 1st, That all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place, only where the consideration is not shown, can be no reason why, in cases where the special matter appears, so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will enforce these latter contracts, but not the former.

2dly, It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum,* but every contract must have a consideration, either expressed, as in assumpsits, or implied, as in bonds and covenants, but these latter, though they are perfect as to form, yet may be void as to the matter; as in a covenant to stand seised, which is void without a consideration, though it be a complete and perfect deed.

3dly, It shows why a contract not to trade in any part of England, though with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4thly, This shows why promises in restraint of trade have been held good; for in those contracts, it is always necessary to show the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shown. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of Judge Hall in 2 H. 5, fol. quinto; for suppose (as the case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare, that he would not follow it any more, &c., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner[1] of expressing it. Surely it is not fit that such un-

[1] Hall expressed himself thus: A ma intent vous purres aver demurrer sur luy que le obligation est void, co que le condition est encountre common ley, &c., per Dieu si le plaintiff fuit icy, il irra al prison tanq; il ust fait fine au Roy.

reasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good, but when it is reduced into the form of a bond, it immediately becomes void; but for what reason, see 3 Lev. 241. Now a bond may be considered two ways, either as a security, or as a compensation; and

1st, Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise, to be.

2dly, Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contracting, may not settle the *quantum* of damages for such an injury? Bract, lib. 3, c. 2, sect. 4.

It would be very strange, that the law of England that delights so much in certainty, should make a contract void, when reduced to certainty, which was good, when loose and uncertain; the cases in March's Rep, 77, 191, and also Show. 2, are but indifferently reported, and not warranted by the authorities they build upon.

1st Objection. In a bond the whole penalty is to be recovered, but in assumpsit only the damages.

Response. This objection holds equally against all bonds whatever.

2d Objection. Another objection was, that this is like the case of an infant, who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees.

Response. The case of an infant stands on another reason (viz.), a general disability to make a deed; but here both parties are capable; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable; but it is otherwise here.

Also the case of a sheriff is very different; for at common law he could take nothing for doing his duty, but the statute has given him certain fees; but he can neither take more, not a chance for more, than that allows him.

3d Objection. It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case?

Response, 1st. It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is a matter of law, not fit for a jury to determine.

2dly, It is to ascertain the damages; but *cui bono* (say they) should that be done? is it for the benefit of the obligor?

Response. Certainly it may be necessary on that account for these reasons:

1st, A bond is more favorable for him than a promise: for

the penalty is a re-purchase of his trade ascertained before hand, and on payment thereof he shall have it again; he may rather choose to be bound not to do it under a penalty, than not to do it all.

2dly, However it be, it is his own act.

3dly, He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

4thly, Restraints by custom may (as I have proved) be enforced with penalties which are imposed without the party's consent, nay by the injured party without the concurrence of the other; and if so, then *a fortiori* he may bind himself by a penalty.

Objection. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labors to prevent.

Response. But this is no more to be presumed than false testimony, and in such a case, I should think the defendant might aver against it; for though the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of an usurious contract.

The application of this to the case at bar is very plain; here the particular circumstances and consideration are set forth, upon which the court is to judge, whether it be a reasonable and useful contract.

The plaintiff took a baker's house, and the question is, whether he or the defendant shall have the trade of this neighborhood? the concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration (viz.), the term of five years.

To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

For these reasons we are of opinion, that the plaintiff ought to have judgment.[1]

[1] In United States *v.* Addyston Pipe & Steel Co., 85 Fed. 271 (C. C. A.) at page 281, Taft, Circuit Judge, thus enumerated the permissible kinds of contracts in restraint of trade: "Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with business of the firm; (4) by the buyer of property not to use the same in competition with the business restrained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or

JULIUS GARST *v.* FRANK M. HARRIS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 2–18, 1900

[*Reported in* 177 *Massachusetts,* 72.]

CONTRACT, for breach of the following agreement:

"For and in consideration of the per cent deducted from the full retail price, as per list appended hereto, allowed by the Phenyo Caffein Company, the vendee or retailer hereby agrees that he will not sell, nor allow any one in his employ to sell, directly or indirectly, Phenyo Caffein, 25 cent size, for less than 25 cents a single box, five boxes for one dollar, twelve boxes for two dollars and twenty-five cents, nor the 10 cent size for less than the face price.

"The vendee, or retailer, further agrees, that if he violates the terms of this contract, he will pay to the Phenyo Caffein Company the sum of $21, that sum being the agreed amount that the Phenyo Caffein Company would be damaged by a breach of this agreement. This clause, as to the amount of damages, is inserted because it is recognized and agreed that a breach of this agreement would cause the Phenyo Company to suffer a material loss, and also that it would be very difficult and usually impossible to prove the exact amount of such loss.

"The vendee, or retailer, further agrees that the acceptance of said goods, with the notice of the conditions of sale, shall be held to be an assent on his part to the foregoing terms, and an agreement with the Phenyo Caffein Company, to sell subject to the price restrictions fixed by it.

"This agreement is made subject to the stipulation that in case the vendee, or retailer, should desire to discontinue the sale of Phenyo Caffein, and notifies the Phenyo Caffein Company of that fact, in writing, said company agrees to buy from the vendee, or retailer, any of the said Phenyo Caffein at the net cost price at which it was sold to him."

Then followed a specification of the price and discount to the retail trade.

The case was submitted to the Superior Court, and, after judgment for the plaintiff for $21, by GASKILL, J., to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

W. C. Mellish, for the defendant.

W. Thayer (*H. W. Cobb,* with him), for the plaintiff.

HOLMES, C. J. This is an action of contract to recover $21 as liquidated damages for breach of an agreement not to sell Phenyo Caffein below a stipulated price. Phenyo Caffein was a proprietary

(6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business."

medicine purchased by the defendant of the plaintiff. At the time of the sale and as a part of it a written statement of terms containing this agreement was read to the defendant and delivered to him. One stipulation expressed in the document was that the acceptance of the goods with the notice of the conditions of the sale should be an assent to the terms. The defendant accepted the goods and expressed no dissent. There is no question, therefore, that he agreed to those terms upon the consideration of the sale, which was made with a deduction from the full retail price. The defendant sold the goods so purchased below the stipulated price and broke his contract. So much of the defendant's argument as denies the agreement, the consideration, or the applicability of the contract to the goods sold needs no further discussion.

The rest of the defence needs but a few words. It is said that the contract was unlawful as in restraint of trade. Some limits were set to the inherited doctrine on this subject by the recent case of Anchor Electric Co. *v.* Hawkes, 171 Mass. 101, as they had been in England before. When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough. See Morse Twist Drill & Machine Co. *v.* Morse, 103 Mass. 73; Central Shade Roller Co. *v.* Cushman, 143 Mass. 353; Gloucester Isinglass & Glue Co. *v.* Russia Cement Co., 154 Mass. 92; Fowle *v.* Park, 131 U. S. 88, 97; Walsh *v.* Dwight, 40 App. Div. (N. Y.) 513.

It is suggested that the sum agreed upon in the writing as liquidated damages is a penalty. But it is admitted in the agreed facts that the damages are substantial and difficult to estimate, and it was recognized in the contract that they would be so. It has been decided recently that parties are to be held to their words upon this question except in exceptional cases where there are special reasons for a different decision. Guerin *v.* Stacy, 175 Mass. 595. In this case there is every reason for upholding the general rule. Chase *v.* Allen, 13 Gray, 42; Lynde *v.* Thompson, 2 Allen, 456.

Judgment for the plaintiff.[1]

PULP WOOD COMPANY Appellant, *v.* GREEN BAY & FIBER COMPANY, Respondent

Wisconsin Supreme Court, May 23–June 17, 1914

[*Reported in* 157 *Wisconsin,* 604]

This action arises from a series of contracts in which the plaintiff agreed to supply the defendant with pulp-wood for its paper mill.

[1] In Boston Store *v.* American Graphophone Co., 246 U. S. 8 contracts between the manufacturer of patented graphophones and all dealers throughout the country permitted to sell them fixing the resale price were held invalid.

The contracts were made from year to year, during the years 1904 to 1909. They were alike in terms except as to the amount of wood to be furnished, and the so-called base price for it.

The contracts in effect provided that the plaintiff should sell a named quantity of pulp-wood at certain fixed prices, but also provided that if the plaintiff was not able to furnish certain specified amounts needed to fulfill its contracts with certain named purchasers, the defendant would accept its *pro rata* share of the plaintiff's production as full satisfaction. And if, on the other hand, the plaintiff found it necessary in order to operate economically, to produce more than the amount required for such contracts, the defendant agreed to take a *pro rata* share of the excess. It was further provided that the defendant should not purchase any pulp-wood elsewhere, and that at the end of the season the so-called base price should be so adjusted as to make the defendant pay a *pro rata* share of the costs of the plaintiff's product and seven per cent on the capital employed, an additional payment being made by the defendant, or a rebate paid to him, as circumstances might require.

Three causes of action are stated by the plaintiff: First, to recover from the defendant a *pro rata* share of a loss incurred by the plaintiff in its operations; second, to recover damages for the defendant's failure to receive wood on its contracts when tendered; and, third, to recover an alleged balance for wood delivered to the defendant, and not paid for.

The defendant demurred to the complaint.[1]

BARNES, J. The defendant contends that the contracts sued on are void under the federal Anti-Trust Act, 26 U. S. Stats. at Large, 209, ch. 647 (3 U. S. Comp. Stats. 1901, p. 3200), which is as follows:

"Sec. 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

'Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[1] The statement of facts has been abbreviated.

Further, that such contracts were made in violation of secs. 1791*j* and 1747*e*, Stats. of Wis., which read as follows:

"Sec. 1791*j*. Any corporation organized under the laws of this state which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall upon proof thereof, in any court or competent jurisdiction, have its charter or authority to do business in this state canceled and annulled. Every corporation shall upon filing its annual report with the secretary of state, make and attach thereto the affidavit of its president, secretary or general managing officer, fully stating the facts in regard to the matters specified in this section."

"Sec. 1747*e*. Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every person who shall combine or conspire with any other person to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section."

The circuit court held that sec. 7 of the contracts by which the contracting consumers agreed not to purchase any pulp from any person, firm, or corporation except the plaintiff, unlawfully restrained trade, in that it took twelve consumers of wood out of the market and operated to the disadvantage of those who had pulp wood to sell by reducing the number of competing buyers.

The principal contention made by respondent's counsel in their brief and on the oral argument is that the contracts evidence a plan or scheme on the part of the contracting parties to control and restrict the output of pulp and paper, to the end that the market might be manipulated and prices raised, and that such purpose is made manifest by the fact that twelve or thirteen large consumers of pulp wood have bartered away their rights from year to year for a series of years to supply their legitimate wants in the way of raw material. It is urged that the plaintiff is a spurious creature, organized for ulterior purposes and to evade the law, and that the real power behind it is a group of manufacturers intent on unduly stimulating competition or suppressing it altogether, as may best suit their lawless wishes, and that the inevitable tendency of the contracts is towards monopoly and unlawful restraint of trade.

The complaint shows that the wood supply furnished to the plaintiff came from the states of Wisconsin, Minnesota and Michigan, and the Dominion of Canada. The contract we think involved interstate commerce, and if so the federal statute is applicable and the case will be treated on that basis. U. S. *v.* Reading Co. 226 U. S. 324, 33 Sup. Ct. 90; Swift & Co. *v.* U. S. 196 U. S. 375, 25 Sup. Ct. 276; U. S. *v.* Patten, 226 U. S. 525, 33 Sup. Ct. 141; Continental W. P. Co. *v.* Louis Voight & Sons Co. 212 U. S. 227, 29 Sup. Ct. 280. So far as this particular case goes, we observe very little difference whether the state or federal statutes or both apply.

The case will first be considered on the aspect principally relied on by respondent's counsel and in reference to the so-called Sherman Anti-Trust Law.

The questionable features of the contracts arise out of the fact that they take in twelve or thirteen large consumers of wood and that these consumers have appointed an agent who has the exclusive authority to buy all their pulp wood.

We do not construe the contracts as fixing a price which the plaintiff was to pay for wood. The prices specified in the sixth paragraph are merely an estimate, made in advance, of what the commodity would probably cost, and payment was to be made on the basis of this estimate as the wood was delivered. When the total expense for the year was ascertained, the purchasers were to settle on the basis of the actual cost, which included seven per cent interest on the capital employed by the plaintiff. If the estimated price was greater than the actual cost the excess was to be refunded by the plaintiff. If the actual exceeded the estimated cost the purchasers were required to make up the deficiency and pay in proportion to the amount of wood purchased. This we deem to be the clear intent and meaning of paragraph 10 of the contract and of the provisions of the same taken as a whole. No other contract could be made if the actual purpose was to secure a supply of wood. The contracts covered future deliveries for a period of a year. Many conditions might arise which would materially affect the supply of wood. A good winter for hauling would tend toward a large supply and a lower price, while an open winter would greatly curtail output and tend to increase the price. The varying conditions of the wood market are reflected in the estimated prices found in the contracts. The estimated price of spruce was $2 per cord higher for 1907 than for 1905, and of hemlock $1.50 per cord higher. The plaintiff would have to pay the going prices whatever they were or go without wood. Its net earnings were restricted to seven per cent. on the capital it had invested. We do not understand that there is any serious dispute between the parties as to the intent and meaning of the contract in this regard. Neither do we think there is any doubt that the

manufacturers who were parties to contracts like that set forth in the statement of facts attempted to make the plaintiff their sole agent and to give it the exclusive right to purchase their supply of wood. If it appears from the contracts, read in connection with the allegations of the complaint, that the parties had no lawful right to make such agreements, or that the agreements contravene public law, then the contracts are void and the action will not lie, because recovery cannot be had on a void contract. Menominee River B. Co. *v.* Augustus Spies L. & Co. 147 Wis. 559, 132 N. W. 1118.

The complaint being challenged by demurrer, every reasonable intendment must be made in favor of the pleading. Downer *v.* Tubbs, 152 Wis. 177, 179, 139 N. W. 820; Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179.

"In law every intendment that harmonizes with honesty and fair dealing must be presumed in the light of the alleged facts." Forest Co. *v.* Shaw, 150 Wis. 294, 304, 136 N. W. 642.

Where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted. Hobbs *v.* McLean, 117 U. S. 567, 576, 6 Sup. Ct. 870; U. S. *v.* Cent. Pac. R. Co. 118 U. S. 235, 6 Sup. Ct. 1038, cited in Watters *v.* McGuigan, 72 Wis. 155, 157, 39 N. W. 382; Hicks P. Co. *v.* Wis. Cent. R. Co. 138 Wis. 584, 591, 120 N. W. 512.

"When the terms of a contract are indefinite, uncertain, and susceptible of two constructions, and by giving them one construction one of the parties would be subjected to a forfeiture, and by giving them the other no such forfeiture would be incurred and no injustice would be done to the other party, the contract should be so construed as not to create the forfeiture." Jacobs *v.* Spalding, 71 Wis. 177, 190, 36 N. W. 608; Weidner *v.* Standard L. & A. Ins. Co. 130 Wis. 10, 19, 110 N. W. 246; Hicks P. Co. *v.* Wis. Cent. R. Co. 138 Wis. 584, 590, 591, 120 N. W. 512; Appleton Iron Co. *v.* British Am. Assur. Co. 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; Wier *v.* Simmons, 55 Wis. 637, 13 N. W. 873.

A violation of the federal Anti-Trust Act is made a misdemeanor which is punishable by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court.

"It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal." Brown *v.* State, 137 Wis. 543, 119 N. W. 338.

It is substantially ruled in some of the federal courts that in close and doubtful cases arising under the Anti-Trust Law and in-

volving intricate questions, the merits will not be passed upon on demurrer nor until all the essential facts are before the court, where such facts may materially aid in determining whether or not the law has been violated. U. S. *v.* Winslow, 195 Fed. 578, applying the equity rule as stated in Kansas *v.* Colorado, 185 U. S. 125, 144, 145, 22 Sup. Ct. 552. This rule is not binding on this court, but does not differ essentially from our uniform holdings in later years as to when a complaint will be held bad on general demurrer.

There is not so much difficulty at the present time in determining what the law is as there is in making the proper application of established rules to the facts in each particular case. There has been a world of decisions on our anti-trust laws, common and statute, in the state and federal courts. To attempt to review them all would be a work of supererogation. To harmonize them would be an impossibility. On the federal Anti-Trust Statute, however, our court of last resort has recently spoken in a number of well considered decisions in which the act of Congress has been carefully and learnedly analyzed and its scope defined. Standard Oil Co. *v.* U. S. 221 U. S. 1, 31 Sup. Ct. 502; U. S. *v.* American T. Co. 221 U. S. 106, 31 Sup. Ct. 632; U. S. *v.* Patten, 226 U. S. 525, 33 Sup. Ct. 141; Standard S. M. Co. *v.* U. S. 226 U. S. 20, 33 Sup. Ct. 9; U. S. *v.* Reading Co. 226 U. S. 324, 33 Sup. Ct. 90; Swift & Co. *v.* U. S. 196 U. S. 375, 25 Sup. Ct. 276; U. S. *v.* Terminal R. R. Asso. 224 U. S. 383, 32 Sup. Ct. 507; Northern S. Co. *v.* U. S. 193 U. S. 197, 24 Sup. Ct. 436; Montague & Co. *v.* Lowry, 193 U. S. 38, 24 Sup. Ct. 307; Continental W. P. Co. *v.* Louis Voight & Sons Co. 212 U. S. 227, 29 Sup. Ct. 280. Many other cases might be cited, but a reference to them will be found in the foregoing decisions.

Whatever understanding or misunderstanding may have arisen out of the decisions in U. S. *v.* Trans-Missouri F. Asso. 166 U. S. 290, 17 Sup. Ct. 540, and U. S. *v.* Joint Traffic Asso. 171 U. S. 505, 19 Sup. Ct. 25, it is now definitely decided that the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-Trust Act embraced only acts, contracts, agreements, or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade and that Congress intended that those words used in the act should have a like significance. Standard Oil Co. *v.* U. S., *supra;* U. S. *v.* American T. Co., *supra.* These decisions have been freely criticised and often denounced, but they are the law of the land. It is more than three years since they were announced, during which time Congress has been in almost continuous session. So far as we know there has not even been any attempt to pass a law declaring that every contract, combination, or conspiracy in restraint is unlawful regardless of the extent of the restraint. We are inclined to agree with respon-

dent's counsel that in the discussion of these cases "the light of reason" has "often been absent."

The real question before us for solution is: Do the contracts referred to, read in connection with the allegations of the complaint, show that they operated to the prejudice of the public interest by unduly restricting competition or by unduly obstructing the due course of trade?

The answer depends on the extent to which competition has been restricted or trade has been obstructed. This must be determined from the existing facts. When the facts are ascertained the question of whether the restraint is reasonable or otherwise is one of law. Richards *v.* American D. & S. Co. 87 Wis. 503, 513, 58 N. W. 787. Sometimes the essential facts may be so clearly shown by the contract involved, if one is involved, that further evidence is unnecessary to show that the restraint is unlawful. There is another class of cases where the contract in itself may present an innocent appearance, but when considered in the light of other facts and circumstances, including the purpose for which it was made, the objects sought to be accomplished and the results actually brought about, the contract may be positively vicious. In such cases the contract constitutes a link in the chain of evidence. There is a third class of cases where the contract involved shows some restriction of competition or some obstruction of trade, but does not show whether such restriction or obstruction is undue and unreasonable or otherwise. In such cases it is necessary to resort to evidence *dehors* the contract to ascertain whether it is void or valid.

The contracts involved in this case would seem to fall within the latter class. If they are reasonably susceptible of an interpretation which would render them lawful, it is the duty of the court to place that interpretation upon them. It is argued by counsel for respondent that these contracts place a limitation on the production of pulp and likewise on the output of paper; that there is a federation of interests between the contracting parties; that estimates of the amount of wood required are made so as to effectuate the ulterior purposes of the parties, or it may be the group itself makes the estimates; that the power is centered in this group to dominate the pulp and paper market; that plaintiff is merely a clearing-house for carrying out the unlawful objects of the combine; that the contracts referred to give the plaintiff power to crush competitors and force combinations; that they inevitably tend toward monopoly; that an unlawful restraint is placed upon the contracting consumers, in that they are not permitted to buy any part of their supply of wood under any circumstances. Some other considerations of like tenor and effect are suggested, but the foregoing is a substantially full epitome of the contentions of counsel on the point principally argued. These contracts are roundly and at times extravagantly denounced by counsel.

Defendant asks us to assume altogether too much in passing upon these contracts and the averments of the complaint. This is not an action brought by or in behalf of the public to dissolve an unlawful combination. It is a case where one *particeps criminis* is trying to avoid responsibility to his co-partners in crime, if any crime was in fact committed. In berating the plaintiff the defendant is also belaboring itself. It is true, it had no stock in the plaintiff corporation, but if the corporation was organized for an unlawful purpose, the defendant aided, abetted, and assisted it in the execution of such unlawful purpose. The contracts before us covered a period of six or seven years. If the production of pulp wood and of paper was restricted for the purpose of inflating the price of paper or depressing the price of wood, the defendant is as well aware of that fact as is any one else, and whether it is or not the matter is easily susceptible of proof. The defendant certainly knows how long its mill was shut down for want of pulp wood if it was shut down at all. It can be readily ascertained how long the other mills whose owners made like contracts were shut down for this or any other cause during the period. If no attempt was in fact made during this time to restrict output so as to squeeze up prices abnormally or to do other unlawful acts, that would be pretty convincing evidence that the plaintiff corporation was not organized to juggle the paper market. If the plaintiff has crushed or attempted to crush competitors, or has forced or attempted to force unlawful combinations to control the wood or paper market, these things should be susceptible of proof, but it is not apparent from the contracts or from the complaint that it has done either.

For aught we know it may be shown on the trial that the contracting manufacturers made their estimates large enough to cover their needs without interference from any one; that the estimated amounts were substantially furnished, or that a good-faith attempt was made to supply them; that the exercise of that reasonable diligence which plaintiff agreed to exercise was sufficient to insure a full supply of wood, or at least as much as the mill owners could secure if they were themselves engaged in the work of buying; that the mills affected had all the wood they needed at all times, and that there was no thought of restricting the output of paper or pulp and that there was no restriction in fact and no influence exerted on the paper market whatever by this alleged unlawful combine. It might even be made to appear that the only harm which the parties could do, if they attempted to reduce production, would be to themselves. It might also be made to appear that the plaintiff was organized to further legitimate economies in the cost of the article which the mill men had to offer the consuming public. Manifestly the question under consideration cannot be intelligently decided until the actual facts are before the court, because the complaint and contracts do not affirmatively establish the fact that there has been any undue

restraint of competition or any undue obstruction of the course of trade. It is possible to imagine many things that might have happened, but the vital question here, after all, is, What has been done? The court should not be asked to draw on its imagination for its facts. The plaintiff has been operating long enough so that its practices should be well known. We do not think the contracts on their face inevitably tend to unduly restrain trade or competition.

There is nothing in itself unlawful in two or more persons appointing a common agent to purchase a commodity which they require and in giving such agent the exclusive right to do the buying. Nat. D. Co. *v.* Cream City I. Co. 80 Wis. 352, 56 N. W. 864; Kellogg *v.* Larkin, 3 Pin. 123; Wheeler-Stenzel Co. *v.* American W. G. Co. 202 Mass. 471, 476, 89 N. E. 28; Burley T. Soc. *v.* Gillaspy (Ind.) 100 N. E. 89; Reeves *v.* Decorah F. C. Soc. (Iowa) 140 N. W. 844; First Nat. Bank *v.* Missouri G. Co. 169 Mo. App. 374, 152 S. W. 378; Central S. R. Co. *v.* Cushman, 143 Mass. 353, 9 N. E. 629; New York T. R. Co. *v.* Brown, 61 N. J. Law, 536, 43 Atl. 100; Arkansas B. Co. *v.* Dunn, 173 Fed. 899; Anderson *v.* U. S. 171 U. S. 604, 613, 614, 19 Sup. Ct. 50; Connolly *v.* Union S. P. Co. 184 U. S. 540, 22 Sup. Ct. 431, read in connection with additional facts stated in dissenting opinion of Justice HOLMES in Continental W. P. Co. *v.* Louis Voight & Sons Co. 212 U. S. 227, 29 Sup. Ct. 280. We do not wish to be understood as approving all that is said in those cases.

Such an arrangement becomes unlawful when it injuriously affects the public, or, in other words, when it unduly restricts competition or restrains trade. Ordinarily the invalidity of such an agreement must be made to appear from facts outside of the contract, because the writing seldom shows the facts necessary to determine whether the restraint is reasonable and permissible or undue and criminal. The circuit court thought the contract was unlawful because it took a dozen consumers of wood out of the market and thus materially affected those who had pulp wood for sale, by reducing the number of buyers. The idea of the court was that the contracts had a tendency to reduce the price of wood. This is a contention not very often made in this class of cases, because, if true, it would also have a tendency to reduce the price at which the manufactured article might be sold to the consuming public. However, we think the pulp-wood producer is entitled to protection against combinations which unreasonably depress the price of his commodity, even though the general public might to some extent benefit by the depression.

The complaint shows that the mills for which plaintiff acted as agent used about twelve per cent of the entire output of wood in the territory in which it made its purchases. It cannot be held as a conclusion of law on these facts that there was an undue restraint of competition. The producers of wood have made no complaint on this

score. There may have been an abundance of buyers to insure fair and free competition in bidding and a fair and adequate price for the wood. If so, it could not be said that competition was unduly restricted. The question is one calling for evidence to show how and to what extent it was reasonably probable that those who had wood for sale were affected.

The first cause of action is brought to recover a loss sustained on the Perry contract. The effect of that contract on this cause of action has not been much discussed by counsel. There are three causes of actions stated in the complaint, and the demurrer is interposed to the whole complaint, so that if any good cause of action is stated the order appealed from is erroneous. We do not deem it necessary to decide on the validity of that contract, or to what extent, if any, it would affect the plaintiff's right of recovery on its first cause of action should the contract be held void.

The mere fact that the plaintiff corporation was an unlawful combination would not relieve the defendant from paying for the goods purchased from it, provided the contract of purchase was not in itself unlawful. Nat. D. Co. *v.* Cream City I. Co. 86 Wis. 352, 56 N. W. 864; Connolly *v.* Union S. P. Co. 184 U. S. 540, 22 Sup. Ct. 431; International H. Co. *v.* Eaton Circuit Judge, 163 Mich. 55, 127 N. W. 695; Chicago W. P. Mills *v.* General P. Co. 147 Fed. 491. This being the law, it is not apparent how the defendant can derive any benefit from sec. 1791*j*, Stats. of Wis.

Sec. 1747*e*, Stats. of Wis., is a copy of the federal statute, except that it applies to attempts to monopolize trade and commerce within the state and prescribes a lesser penalty for its violation than is provided for in the act of Congress. It originally appeared as ch. 219, Laws of 1893. Since then it has received substantially the same construction, *sub silentio* at least, that was placed on the federal law in the *Standard Oil* and *Tobacco Cases*, as will be seen from an examination of the following cases decided since the law was enacted: Cottington *v.* Swan, 128 Wis. 321, 197 N. W. 336; My Laundry Co. *v.* Schmeling, 129 Wis. 597, 109 N. W. 540; Kradwell *v.* Thiesen, 131 Wis. 97, 111 N. W. 233; Burton *v.* Douglass, 141 Wis. 110, 123 N. W. 631; Eureka L. Co *v.* Long, 146 Wis. 205, 131 N. W. 412; Ruhland *v.* King, 154 Wis. 545, 143 N. W. 681; Nat. D. Co. *v.* Cream City I. Co., *supra;* Richards *v.* American D. & S. Co. 87 Wis. 503, 58 N. W. 787; Tecktonius *v.* Scott, 110 Wis. 441, 86 N. W. 672. If the above statute has any application to the facts in this case, it should receive the same interpretation that was placed on the federal act, from which it was taken, by the supreme court of the United States.

By the Court. — Order reversed, and cause remanded for further proceedings.

KERWIN, J., took no part.

SECTION II

WAGERS AND GAMING CONTRACTS

HAMPDEN *v.* WALSH

IN THE QUEEN'S BENCH DIVISION, January 17, 1876

[*Reported in* 1 *Queen's Bench Division,* 189]

THE judgment of the court (Cockburn, C. J., and Mellor and Quain, JJ.), was delivered by —

COCKBURN, C. J. This is an action brought to recover the sum of 500*l.* deposited by the plaintiff with the defendant, under the following circumstances: —

The plaintiff, it appears, entertains a strong disbelief in the received opinion as to the convexity of the earth, and with the view, it seems, of establishing his own opinion in the face of the world, he published in a journal called "Scientific Opinion," an advertisement in the following words: "The undersigned is willing to deposit 50*l.* to 500*l.* on reciprocal terms, and defies all the philosophers, divines, and scientific professors in the United Kingdom to prove the rotundity and revolution of the world, from Scripture, from reason, or from fact. He will acknowledge that he has forfeited his deposit if his opponent can exhibit to the satisfaction of any intelligent referee a convex railway, canal, or lake."

The challenge thus thrown out was answered and accepted by a Mr. Alfred Wallace, who offered to stake the like amount "on the undertaking to show visibly, and to measure in feet and inches, the convexity of a canal or lake."

The money was deposited accordingly in a bank, to the credit of Mr. Walsh, the defendant. An agreement was drawn up, whereby it was agreed that, "if Mr. A. R. Wallace, on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of Mr. John Henry Walsh, of 346, Strand, and of Mr. W. Carpenter, of 7, Carlton Terrace, Lewisham Park, or, if they differed, to the satisfaction of the umpire they might appoint," Wallace was to receive the two sums deposited; while if Wallace failed in showing such actual proof of convexity, the two sums were to be paid to the plaintiff. The agreement concluded with the following proviso: "Provided always, that, if no decision can be arrived at, owing to the death of either of the parties, the wager is to be annulled; or if, owing to the weather being so bad as to prevent a man being distinctly seen by a good telescope, at a distance of four miles, then a further period of one month is to

be allowed for the experiment, or longer, as may be agreed upon by the referees."

Mr. Walsh being unable to act as referee, a Mr. Coulcher was substituted for him. Certain tests having been agreed on, the experiment was tried on the Bedford Level Canal. The referees differed; Mr. Coulcher being of the opinion that Mr. Wallace had proved, Mr. Carpenter, that he had not proved, the convexity of the canal. Thereupon it was proposed that the referees should exercise their power of appointing an umpire; but Mr. Carpenter declined to act further in the matter. A correspondence ensued, when it was agreed to leave the matter to the decision of Mr. Walsh, the present defendant, to whom the two referees should submit their reports, and who was at liberty to seek any further information he might deem necessary, and to consult Mr. Solomons, an optician, if he thought proper. Having done so, he decided in favor of Mr. Wallace, as having "proved to his satisfaction the curvature to and fro of the Bedford Level Canal between Witney Bridge and Welsh's dam (six miles), to the extent of five feet more or less."

To this decision the plaintiff objected, and before the defendant had paid over the money to Mr. Wallace, demanded to have the 500*l.* he had deposited restored to him. Notwithstanding which, the defendant paid the two sums of 500*l.* to Wallace.

The question for our decision is, whether upon this state of facts the plaintiff is entitled to recover the sum so deposited by him.

One question which presents itself is, whether this agreement amounts in effect to a wager and if so, whether the plaintiff by the effect of 8 & 9 Vict. c. 109, s. 18, is prevented from maintaining this action.

We will, in the first instance, proceed with case on the assumption that the agreement is in effect a wager.

It is well established by numerous authorities, which it would be here superfluous to cite, that at common law, a wager, being a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on. But by effect of the statutes of 16 Car. 2, c. 7, of 9 Anne, c. 14, and of other statutes for the prevention of gaming, various forms of betting became stamped with illegality, and no action could be maintained by the winner against the loser in respect of them. Nor could any action be brought by the winner against the stakeholder with whom the amount of the wager had been deposited. Wagers not included in these statutes remained as before, and could be made the subject-matter of an action, although judges sometimes refused to try such actions, especially where the subject-matter of the wager was of a low or frivolous character, as unworthy to occupy the time of a court of justice.

As the law now stands, since the passing of 8 & 9 Vict. c. 109, there is no longer, as regards actions, any distinction between one class of wagers and another, all wagers being null and void at law by that statute.

But though, where a wager was illegal, no action could be brought either against the loser or stakeholder by the winner, a party who had deposited his money with the stakeholder was not in the same predicament. If, indeed, the event on which the wager depended had come off, and the money had been paid over, the authority to pay it not having been revoked, the depositor could no longer claim to have it back. But if, before the money was so paid over, the party depositing repudiated the wager and demanded his money back, he was entitled to have it restored to him, and could maintain an action to recover it; and this, not only where, as in Hodson *v.* Terrill, 1 Cr. & M. 797, notice had been given to the stakeholder prior to the event being determined, but also where, as in Hastelow *v.* Jackson, 8 B. & C. 221, notice was given after the event had come off.

In Hodson *v.* Terrill, 1 Cr. & M. 797, the deposit had been made on a cricket match for 20*l.* a side, and was therefore unlawful within the statute of Anne. A dispute having arisen in the course of the match, and one side having refused to play it out, the plaintiff, who had paid a deposit, claimed to have it returned, and it was held that he was entitled to recover.

So in Martin *v.* Hewson, 10 Ex. 737, 24 L. J. (Ex.) 174, in an action for money had and received to plaintiff's use, the defendant having pleaded that the money had been deposited with him to abide the event of a cock-fight, the replication, that before the result was ascertained the plaintiff repudiated the wager, and required repayment of the deposit, was held good. In Hastelow *v.* Jackson, 8 B. & C. 221, the Court of Queen's Bench, following the prior cases of Cotton *v.* Thurland, 5 T. R. 405, Smith *v.* Bickmore, 4 Taunt. 474, and Bate *v.* Cartwright, 7 Price, 540, held that, where, money having been deposited with the stakeholder to abide the event of a boxing match, A., the depositor, claimed the whole sum from the stakeholder, as having won the fight, and threatened him with an action if he paid it over to B., the other combatant, which he nevertheless did by direction of the umpire, A. was entitled to recover the money he had deposited as his own stake as money had and received to his use. "If," says Bayley, J., "a stakeholder pays over the money without authority from the party and in opposition to his desire, he does so at his own peril." These cases have never been overruled, and must be considered as law: although in Meaning *v.* Hellings, 14 M. & W. at p. 712, Alderson, B., speaks doubtingly of the decision in Hastelow *v.* Jackson, 8 B. & C. 221, using the expression "that case does not convince me, it overcomes me." But that case seems to have been decided more on the form of the particulars than anything else, and does not seriously interfere with the authority of

Hastelow *v.* Jackson, 8, B. & C. 221, which seems to us to be good law.

A distinction has, however, been taken between cases in which the deposit was made to abide the event of an illegal wager, and others, in which the wager, not being prohibited by statute, or of an improper character, was legally binding. In the former cases, the contract between the principals being null and void, the money remains in the hands of the stakeholder devoid of any trust in respect of the other party, and in trust only for the party depositing, who can at any time claim it back before it has been paid over. In the latter, the contract, prior to 8 & 9 Vict. c. 109, s. 18, not being invalid, it was open to contention that money deposited on the wager with a stakeholder must remain with the latter to abide the event.

Greater difficulty, therefore, presented itself where, prior to 8 & 9 Vict. c. 109, s. 18, money was deposited on a wager not illegal; and the Courts of King's Bench and Exchequer were at variance on this point. In Eltham *v.* Kingsman, 1 B. & Ald. 683, the Court of King's Bench, consisting of Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ., held that even where the wager was legal, the authority of a stakeholder, who was also (as is the case with the present defendant) to decide between the parties, might be revoked and the deposit demanded back. "Here," says Lord Ellenborough, "before there has been a decision the party has countermanded the authority of the stakeholder." "A man," says Abbott, J., "who has made a foolish wager may rescind it before any decision has taken place." In the later case of Emery *v.* Richards, 14 M. & W. 728, the Court of Exchequer, where money has been deposited on a wager of less than 10*l.* on a foot race, and therefore, prior to the passing of the statute 8 & 9 Vict., not illegal under the then existing statute, held that the plaintiff could not demand to have his stake returned, but must abide the event. The case of Eltham *v.* Kingsman, 1 B. & Ald. 683, does not, however, appear to have been brought to the notice of the court, and in our view the decision of this court was the sounder one. We cannot concur in what is said in Chitty on Contracts, 8th ed., p. 574, that "a stakeholder is the agent of both parties, or rather their trustee." It may be true that he is the trustee of both parties in a certain sense, so that, if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long as his authority subsists. Such was evidently the view taken of the position of a stakeholder by this court in the two cases of Eltham *v.* Kingsman, 1 B. & Ald. 683, and Hastelow *v.* Jackson, 8 B. & C. 221; and in that view we concur.

Practically, however, it is now unnecessary to decide this question, if the transaction under consideration is to be looked upon as a wager. For by 8 & 9 Vict. c. 109, s. 18, it is enacted "that all con-

tracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

The present wager, though previously lawful, being thus rendered null and void, it follows that the plaintiff must be entitled to recover his deposit, unless that part of the enactment which provides that, "no suit shall be brought or maintained in any court for recovering any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," affords an answer to the action, — a question on which a difference of opinion exists.[1]

Thus far we have dealt with the agreement between the parties as a wager. But it was contended before us, on the argument, that this was not a wager, but an agreement entered into for the purpose of trying by experiment a question of science. We think this position altogether untenable. The agreement has all the essential characteristics of a wager. Each party stakes his money on an event to be ascertained, and he in whose favor the event turns out is to take the whole. The object of the plaintiff in offering the challenge he gave was not to ascertain a scientific fact, but to establish his own view in a marked and triumphant manner. To use a common phrase, his object was to back his own opinion. No part of the money staked was to go to the party by whom the experiment was to be made. Lastly, the parties themselves in the written agreement have spoken of it, in terms, as a "wager." We can have no hesitation in holding it to be such.

But even if our view of the agreement were such as was suggested by the defendant's counsel, our decision would be the same, as the principle of the decision of the court in the cases of Eltham *v.* Kingsman, 1 B. & Ald. 683, and Hastelow *v.* Jackson, 8 B. & C. 221, before cited, would appear to us to apply; according to which we should look upon the defendant merely as the agent of the plaintiff, and as no longer justified in paying over the money when once his authority had been countermanded.

But as we hold the agreement to have been a wager, and consequently that the case is concluded by the authorities we have referred to, it is unnecessary to decide this point.

Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.[2]

[1] The court on examination of decisions held that this provision applied only to suits by the winner of a wager to recover the stakes.

[2] O'Sullivan *v.* Thomas, [1895] 1 Q. B. 698; Universal Stock Exchange *v.* Strachan [1896] A. C. 166; Burge *v.* Ashley, [1900] 1 Q. B. 744; Lewis *v.* Bruton, 74 Ala. 317; Thornhill *v.* O'Rear, 108 Ala. 299; Hale *v.* Sherwood, 40 Conn. 332; Colson *v.* Meyers, 80 Ga. 499; Petillon *v.* Hipple, 90 Ill. 420; Burroughs *v.* Hunt, 13 Ind. 178; Adkins

JOHN S. HOPKINS, Receiver of LAUGHLIN and McMANUS, *v.* ARTHUR O'KANE, Appellant

Pennsylvania Supreme Court, April 1–July 18, 1895

[*Reported in* 169 *Pennsylvania State,* 478]

Rule to open judgment.

From the depositions taken in support of the rule, it appeared that in November, 1892, defendant directed Laughlin and McManus, brokers, to purchase two hundred shares of Reading Railroad stock, for which he paid in full. The brokers received and retained the certificate for the stock, and in December, 1892, at defendant's request resold the stock and retained the proceeds. Subsequently defendant directed the brokers to purchase shares of a traction company, and these in turn were sold by the brokers, and the proceeds retained by them. Similar transactions took place until on February 28, 1893, when defendant was indebted to Laughlin and McManus in the sum of $2,000, for which the judgment note in suit was given. Judgment was entered upon the note by the receiver of the firm of Laughlin and McManus, and subsequently defendant obtained a rule to open the judgment on the ground that the debt grew out of gambling transactions.

The Court discharged the rule, and defendant appealed.

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v. Flemming, 29 Iowa, 122; Pollock *v.* Agner, 54 Kan. 618; Martin *v.* Francis 173 Ky. 529; McDonough *v.* Webster, 68 Me. 530; Fisher *v.* Hildreth, 117 Mass. 558; Morgan *v.* Beaumont, 121 Mass. 7; Whitwell *v.* Carter, 4 Mich. 329; Wilkinson *v.* Tousley, 16 Minn. 263; Pabst Brewing Co. *v.* Liston, 80 Minn. 473; Weaver *v.* Harlan, 48 Mo. App. 319; White *v.* Gilleland, 93 Mo. App. 310; Deaver *v.* Bennett, 29 Neb. 812; Hoit *v.* Hodge, 6 N. H. 104; Hensler *v.* Jennings, 62 N. J. L. 209; Stoddard *v.* McAuliffe, 81 Hun, 524, affirmed without opinion, 151 N. Y. 671; Wood *v.* Wood, 3 Murph. 172; Forrest *v.* Hart, 3 Murph. 458; Dunn *v.* Drummond, 4 Okla. 461; Willis *v.* Hoover, 9 Oreg. 418; Conklin *v.* Conway, 18 Pa. 329; Davis *v.* Fleishman, 245 Pa. 224; McGrath *v.* Kennedy, 15 R. I. 209; Bledsoe *v.* Thompson, 6 Rich. L. 44; Guthman *v.* Parker, 3 Head, 234; Lillard *v.* Mitchell, 37 S. W. Rep. (Tenn.) 702; Lewy *v.* Crawford, 5 Tex. Civ. App. 293; West *v.* Holmes, 26 Vt. 530, *acc.* See also Shoolbred *v.* Roberts, [1899] 2 Q. B. 560, [1900] 2 Q. B. 497; Trenery *v.* Goudie, 106 Iowa, 693; Jones *v.* Cavanaugh, 149 Mass. 124. But see *contra,* Matthews *v.* Lopus, 24 Col. App. 63; Kelley *v.* Dirks, 40 S. Dak. 453, 455.

In a few States demand must be made upon the stakeholder before the wager has been decided. Johnston *v.* Russell, 37 Cal. 670; Davis *v.* Holbrook, 1 La. Ann. 176; Hickerson *v.* Benson, 8 Mo. 8; Connor *v.* Black, 132 Mo. 150, 154; Sutphin *v.* Crozer, 32 N. J. L. 257. But in Missouri and New Jersey this doctrine has been affected by statute. See Weaver *v.* Harlan, 48 Mo. App. 319; White *v.* Gilleland, 93 Mo. App. 310; Hensler *v.* Jennings, 62 N. J. L. 209.

If a stakeholder pays the winner, before receiving notice of repudiation of the wager, he is not liable. Colson *v.* Meyers, 80 Ga. 499; Frybarger *v.* Simpson, 11 Ind. 59; Adkins *v.* Flemming, 29 Iowa, 122; Himmelman *v.* Pecaut, 133 Iowa, 503; Goldberg *v.* Feiga, 170 Mass. 146; Riddle *v.* Perry, 19 Neb. 505; Bates *v.* Lancaster, 10 Humph. 134; unless made so by statute, see Hensler *v.* Jennings, 62 N. J. L. 209; Ruckman *v.* Pitcher, 1 N. Y. 392, 20 N. Y. 9; Columbia Bank *v.* Holdeman, 7 W. & S. 233; Harnden *v.* Melby, 90 Wis. 5.

Nor can the loser recover from the winner, Davies *v.* Porter, 248 Fed. 397 (C. C. A.) Johnson *v.* Colliex, 161 Ala. 204, 209; Northrup *v.* Buffington, 171 Mass. 468; unless the payment is made by the stakeholder after notice of repudiation by the loser, Love *v.* Harvey, 114 Mass. 80.

Error assigned was above order.

Opinion by Mr. Justice Mitchell, July 18, 1895:

There is nothing in this case which would justify disturbing the judgment. It ought not to be necessary to say again after Peters *v.* Grim, 149 Pa. 163, and other cases, that a purchase of stocks on margin is not necessarily a gambling transaction. Stocks may be bought on credit, just as flour or sugar or anything else, and the credit may be for the whole price or for a part of it, and with security or without it. "Margin" is security, nothing more, and the only difference between stocks and other commodities is that as stocks are more commonly made the vehicle of gambling speculation than some other things, courts are disposed to look more closely into stock transactions to ascertain their true character. If they are real purchases and sales, they are not gambling though they are done partly or wholly on credit.

The appellant himself testified that the first transaction involved in this case was his purchase of two hundred shares of Reading. "I bought them outright," and paid for them. Shortly afterwards he sold them, and on his order, the brokers bought Traction stock, and retained the proceeds of the Reading as part payment for it. The subsequent transactions were of the same character, actual purchases and sales in which the stocks bought were received by the brokers for defendant, and those sold delivered by them for him to the purchasers. There was all the time on the broker's book a standing credit to appellant of the money received on his account from the sale of the Reading stock, and the subsequent debits and credits for the later purchases and sales. The account closed unfortunately for the appellant with a balance against him, but there is no allegation, certainly no evidence, that it was not correct.

Judgment affirmed.[1]

[1] Universal Stock Exchange *v.* Stevens, 66 L. T. N. S. 612; Forget *v.* Ostigny, [1895] A. C. 318; Union Nat. Bank *v.* Carr, 15 Fed. Rep. 438; Clews *v.* Jamieson, 182 U. S. 461; Hatch *v.* Douglas, 48 Conn. 116; Titcomb *v.* Richter, 89 Conn. 226; Corbett *v.* Underwood, 83 Ill. 324; Oldershaw *v.* Knowles, 101 Ill. 117; Perin *v.* Parker, 126 Ill. 201; Fisher *v.* Fisher, 113 Ind. 474; Sondheim *v.* Gilbert, 117 Ind. 71; Ball *v.* Campbell, 30 Kan. 177; Sawyer *v.* Taggart, 14 Bush, 727; Durant *v.* Burt, 98 Mass. 161; Bullard *v.* Smith, 139 Mass. 492; Bingham *v.* Scott, 177 Mass. 208; Clay *v.* Allen, 63 Miss. 426; Stenton *v.* Jerome, 54 N. Y. 480; Gruman *v.* Smith, 81 N. Y. 25; Minor *v.* Beveridge, 141 N. Y. 399; Taylor's Estate, 192 Pa. 304, 309, 313; Fearson *v.* Little, 227 Pa. 348; Winward *v.* Lincoln, 23 R. I. 476, *acc.*

The Constitution of California, provided until 1908 that all purchases and sales of stock on margin should be void and money paid under them recoverable, but this provision was repealed in 1908. See Willcox *v.* Edwards, 162 Cal. 455.

WILLIAM P. HARVEY AND OTHERS *v.* Z. TAYLOR MERRILL AND ANOTHER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 5, 1889–September 5, 1889

[*Reported in* 150 *Massachusetts,* 1]

CONTRACT to recover for losses incurred by the plaintiffs, in the purchase and sale of pork on the Chicago board of trade for the defendants, and for their commissions as brokers. The case was referred to an auditor, who made a report, which, so far as material, is as follows:—

The plaintiffs were commission merchants and brokers, dealing in provisions and grain as members of the board of trade in the city of Chicago. The defendants were brokers in the city of Boston, who forwarded orders for the purchase and sale of pork, upon contracts for future delivery, to the plaintiffs, who entered into contracts of purchase and sale for future delivery in their own name, but for account of the defendants, the defendants promising to pay them a commission for the execution of such orders, and to reimburse them for any expenses or losses which should be incurred in the final settlement. This action is brought to recover for commissions in the execution of such orders, and for the loss, being the difference between the contracts of purchase which the plaintiffs made on behalf of the defendants and the sales of the same quantity of pork for the same account.

The defendants gave the orders, and the plaintiffs made the contracts. There was a rapid decline in the market shortly after the contracts and purchases were made, in consequence of which, when the contracts for sales were made, there was a loss of about twenty thousand dollars, which the plaintiffs have paid and have suffered.

It was the custom in such dealings for persons in the situation of the plaintiffs to require a deposit of a margin, unless the person executing the orders was content to rely upon the pecuniary responsibility of the person giving such orders, and there was a customary margin of a dollar a barrel on pork at that time in these transactions made on the Chicago board of trade. A draft of one thousand dollars was sent on May 28, 1883, and credited as a margin, and another sum of three thousand dollars as a margin was sent by the defendants about July 2, in response to a request from the plaintiffs for the same.

The principal ground of defence was that these contracts were made upon the mutual understanding that no delivery of the merchandise was intended or expected, but that, by a series of offsetting contracts of sales for future delivery of the same kind of merchandise, settlements were to be made by the payment of the differ-

ence in price, according to the state of the market as it should rise or fall, and that the contracts were merely a device to enable the parties to make, in effect, wagers upon the probable rise or fall in the market, and thus to gamble upon the chance of such advance or decline in prices.

It was well understood by the parties, both plaintiffs and defendants, that, though the contracts in form called for and required an express delivery of the pork purchased and sold, yet the parties intended and contemplated only transactions by formal contracts, which should be set off one against the other, to avoid the necessity of ever receiving or delivering a single barrel of pork, and that the transactions were to be adjusted and settled solely upon those differences which the chances of the rise and fall of the market should create. These contracts were to be executed in Chicago, and were clearly governed by the law of Illinois and, at the time they were made, a statute was there in force which declared that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, . . . shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Rev. Sts. of Ill. of 1874, c. 38, § 130.[1]

The terms of these contracts did not give the parties an option to sell or buy at a future time this pork; they were contracts to be fulfilled by the delivery of the pork in a future month; and were not such options as are forbidden by the statute. The auditor based his findings as to the invalidity of the contracts upon the fact that, though the parties made express contracts for the purchase of several thousand barrels of pork in June and July, to be delivered in August and September, yet it was well understood between the parties that actual deliveries were not to be made, but such deliveries were to be avoided by the device of making equivalent contracts for the sale of an equal number of barrels of pork deliverable in the same months, and then by making a direct settlement by a set-off of these opposite contracts, and by paying or receiving the difference created by the rise or fall in the market prices. According to the rules of the board of trade, and according to the terms of the contracts made, the purchaser could exact the delivery of the article, and he

[1] See as to the construction of this statute, Wolcott *v.* Heath, 78 Ill. 433; Logan *v.* Musick, 81 Ill. 415; Schneider *v.* Turner, 130 Ill. 28; Ames *v.* Moir, 130 Ill. 582; Corcoran *v.* Lehigh Coal Co., 138 Ill. 390; Preston *v.* Smith, 156 Ill. 359; Wolf *v.* National Bank of Illinois, 178 Ill. 85; Schlee *v.* Guckenheimer, 179 Ill. 593; Ubben *v.* Bimmerman, 182 Ill. 508; Loeb *v.* Stern, 198 Ill. 371; Stewart *v.* Dodson, 282 Ill. 192. Unless forbidden by statute a contract of option is valid. Union Nat. Bank *v.* Carr, 15 Fed. Rep. 138; Hanna *v.* Ingram, 93 Ala. 482; Godman *v.* Heixsel, 65 Ind. 32; Mason *v.* Payne, 47 Mo. 517 Pieronnet *v.* Lull, 10 Neb. 457; Bigelow *v.* Benedict, 70 N. Y. 202; Harris *v.* Tumbridge, 83 N. Y. 93; Lester *v.* Buel, 49 Ohio St. 240, 252; Kirkpatrick *v.* Bonsall, 72 Pa. 155.

could not be required to settle by an offsetting contract; and a seller could likewise insist upon a delivery and payment of the money, and not be required to settle by an offsetting contract. In a vast majority of the transactions of the board of trade, settlement was made by the set-off of opposite contracts; and in every instance such was the mode of dealing between the plaintiffs and the defendants.

The defendants did not deal in these articles of merchandise by the actual receipt and delivery of the same, and never have done so. They had no facilities to handle them by actual receipt and delivery; they had no warehouses; the customers for whom they acted appeared to be residents of Lawrence, in this Commonwealth, and there was no disclosure of any circumstance indicating any facilities on the part of these customers for the receipt, storage, or delivery of such a quantity of these commodities as the defendants ordered to be bought and sold. In a period of two months the defendants ordered purchases of above fifteen thousand barrels of pork, at an aggregate cost of about two hundred and fifty thousand dollars; they also bought large quantities of lard, wheat, corn, and ribs; and the aggregate of the purchases was between four and five hundred thousand dollars, and they were nearly all made within the thirty days following June 11, 1883. In the same period they sold the same quantity of pork, lard, wheat, corn, and ribs as was purchased, with a net loss of between twenty and twenty-five thousand dollars. No warehouse receipt, no bill of lading, and no item of storage appears to have been created in any of these transactions.

The plaintiffs rendered to the defendants an account covering all their transactions, which exhibited a balance due from the defendants to the plaintiffs.

The auditor found for the defendants, solely on the ground that, under the guise of the contracts above described, the real intent was to speculate on the rise and fall of prices, and not to receive or deliver the actual commodities, and therefore that the contracts were wagers; but if his finding in this respect should be incorrect, he found that the plaintiffs were entitled to recover such balance with interest.

The auditor filed a supplemental report, which contained the following statement:—

"The contracts made between members of the board of trade appear, upon the evidence before me, to be valid obligations, some of which, it appears, are executed by actual deliveries; and there was no evidence before me that any ear-mark or distinctive feature of any of the contracts so made existed, by which the majority that were to be set off and cancelled without delivery of merchandise could be distinguished from the minority, in which actual delivery was made. . . . My finding relates to the understanding between the plaintiffs and the defendants, and my conclusion is unchanged that the parties to this suit entered into the dealings with each

other, which are the subject thereof, with a clear understanding that actual deliveries were not contemplated, and were not to be enforced; and it appears to me that the question whether the members of this board with whom the defendants dealt had such an understanding with each other is not material to the issue of this case. If it is material, I do not find such an understanding to have been proved."

At the trial in this court, the reports of the auditor were the only evidence introduced by either party, and Holmes, J., declined to submit the case to the jury, or to direct a verdict for the defendants, as requested by them; but instructed the jury that the plaintiffs were entitled to a verdict upon the auditor's report.

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

R. M. Morse, Jr., and *W. S. Knox,* for the defendants.

E. W. Hutchins and *H. Wheeler,* for the plaintiffs.

FIELD, J. The rights of the parties are to be determined by the law of Illinois, but there is no evidence that the common law of Illinois differs from that of Massachusetts. We cannot take notice of the statutes of Illinois, except so far as they are set out in the auditor's report; and the auditor has set out but one statutory provision of that State, and has found that the parties have not acted in violation of that. We are therefore to determine whether the contract between the parties, as the auditor has found it to be, is illegal and void by the common law of Massachusetts.

It is not denied that, if, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract.[1] If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract, because one or both the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference

[1] Numerous decisions to this effect are collected in 14 Am. & Eng. Encyc. of Law (2d ed.), 609-611. In some jurisdictions contracts to sell in the future stock or merchandise which the seller did not own at the time of the contract are made illegal without reference to any intention that there shall be no delivery. See Fortenbury *v.* State, 47 Ark. 188; Johnston *v.* Miller, 67 Ark. 172; Branch *v.* Palmer, 65 Ga. 210; Moss *v.* Exchange Bank, 102 Ga. 808; Singleton *v.* Bank of Monticello, 113 Ga. 527; Adams *v.* Dick, 226 Mass. 46; Dillard *v.* Brenner, 73 Miss. 130; Violett *v.* Mangold, 27 So. Rep. (Miss.) 875; Connor *v.* Black, 119 Mo. 126, 132 Mo. 150; Edwards Brokerage Co. *v.* Stevenson, 160 Mo. 516; Staples *v.* Gould, 9 N. Y. 520; Springs *v.* James, 137 N. Y. App. D. 110; Gist *v.* Western Union Tel. Co., 45 S. C. 344; Riordan *v.* Doty, 50 S. C. 537; Saunders *v.* Phelps Co., 53 S. C. 173.

between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices.

The construction which we think should be given to the auditor's report is, that he finds that the contracts which the plaintiffs made on the board of trade with other members of that board were not shown to be wagering contracts, and that the contract which the defendants made with the plaintiffs was, that the defendants should give orders from time to time to the plaintiffs for the purchase and the sale on account of the defendants of equal amounts of pork to be delivered in the future; that the plaintiffs should, in their own names, make these purchases and these sales on the board of trade; that the plaintiffs should, at or before the time of delivery, procure these contracts to be set off against each other, according to the usages of that board; that the defendants should not be required to receive any pork and pay for it, or to deliver any pork and receive the pay for it, but should only be required to pay to the plaintiffs, and should only be entitled to receive from them, the differences between the amounts of money which the pork was bought for and was sold for; and that the defendants should furnish a certain margin, and should pay the plaintiffs their commissions.

The defendants gave orders in pursuance of this contract; the plaintiffs made the purchases and sales on the board of trade, set them off against each other, and now sue the defendants for the differences which they have paid and for their commissions.

The auditor has found that, "in a vast majority of the transactions of the board of trade, settlement was made by the set-off of opposite contracts." In his supplemental report he says, "My conclusion is unchanged, that the parties to this suit entered into the dealings with each other which are the subject thereof with a clear understanding that actual deliveries were not contemplated and were not to be enforced; and it appears to me that the question whether the members of this board with whom the defendants dealt had such an understanding with each other is not material to the issue of this case."

The peculiarity of this case, according to the findings of the auditor, is, that while the contracts which the plaintiffs made on the board of trade must be taken to be legal, the plaintiffs have undertaken to agree with the defendants that these contracts should not be enforced by or against them, except by settlements according to differences in prices. If such an agreement seems improbable, it is enough to say that the auditor has found that it was made. The

usages of the board of trade were such that the plaintiffs might well think that they risked little or nothing in making such an agreement. Indeed, the distinction in practice between the majority of contracts which by the auditor's report appear to be made and settled on the board of trade, and wagering contracts, is not very plain, and brokers, for the purpose of encouraging speculation and of earning commissions, might be willing to guarantee to their customers that the contracts made for them on the board of trade should not be enforced, except by a settlement, according to differences in prices.

We do not see why the agreement between the plaintiffs and the defendants, that the defendants should not be required to receive or deliver merchandise, or to pay for or receive pay for merchandise, but should be required to pay to and to receive from the plaintiffs only the differences in prices, is not, as between the parties, open to all the objections which lie against wagering contracts. On the construction we have given to the auditor's report, the plaintiffs, in their dealings with the defendants, in some respects acted as principals. In making the contracts on the board of trade with other brokers, they may have been agents of the defendants. In agreeing with the defendants that they should not be compelled to perform or accept performance of the contracts so made, the plaintiffs acted for themselves as principals. If the defendants had made a contract with the plaintiffs to pay and receive the differences in the price of pork ordered to be bought and sold for future delivery with the understanding that no pork was to be bought or sold, this would be a wagering contract. On such a contract the defendants would win what the plaintiffs lose, and the plaintiffs would win what the defendants lose. But so far as the defendants are concerned, the contracts on which the auditor has found they made with the plaintiffs are contracts on which they win or lose according to the rise or fall in prices, in the same manner as on wagering contracts. If the plaintiffs, by virtue of the contracts they made with other members of the board of trade, were bound to receive or deliver merchandise, and to pay or receive the price therefor, on the auditor's finding they must be held as against the defendants to have agreed to do these things on their own account, and that the defendants should only be bound to pay to them and to receive from them the differences in prices. If the defendants, as undisclosed principals, should be held bound to other members of the board of trade on the contracts made by the plaintiffs, the plaintiffs by the terms of their employment would be bound to indemnify the defendants, except so far as the contracts were settled, by a payment of differences in prices. The agreement of the parties, as the auditor has found it, excludes any implied liability on the part of the defendants to indemnify the plaintiffs, except for money paid in the settlement of differences in prices. The position of the plaintiffs towards the

defendants is no better than it would have been if the plaintiffs had been employed to make wagering contracts for pork on account of the defendants, and had made such contracts, because the plaintiffs, relying upon the usages of the board of trade, have undertaken to agree with the defendants that whatever contracts they make shall bind the defendants only as wagering contracts, and shall be settled as such.

The plaintiffs contend that, even if the contracts which the defendants authorized them to make and which they made on the board of trade had been wagering contracts, yet they could recover whatever money they had paid in settlement of these contracts in the manner authorized by the defendants.

In Thacker *v.* Hardy, 4 Q. B. D. 685, the court found that the plaintiff was employed to make lawful contracts, and ruled that the understanding between the plaintiff and his customer, that the contract should be so managed that only differences in prices should be paid, did not violate the provisions of 8 & 9 Vict. c. 109, § 18. Lindley, J., in giving the opinion at the trial, said, at p. 687: "What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred. Cannan *v.* Bryce, 3 B. & Ald. 179; M'Kinnell *v.* Robinson, 3 M. & W. 434; Lyne *v.* Siesfield, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. Fitch *v.* Jones, 5 E. & B. 238, is plain to that effect." On appeal, Brett, L. J., said, at p. 694: "It was further suggested in Cooper *v.* Neil, W. N., 1 June, 1878, that the agreement was, that although the plaintiff, being a broker to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavorable, and should receive only the profit if it proved favorable; and that no further liability should accrue to the principal, whatever might become of the broker upon the Stock Exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 & 9 Vict. c. 109, § 18, but I thought that there was no evidence of it. And with respect to the present action, I say that there is no evidence that the bargain between the parties

amounted to a transaction of that nature. I retract nothing from what I said in that case."

In England, wagering contracts concerning stocks or merchandise are not illegal at common law, and all the judges in Thacker *v.* Hardy were of opinion that the facts in that case did not show that the transactions between the parties were in violation of the statute.

In Irwin *v.* Williar, 110 U. S. 499, 510, the Supreme Court of the United States says of wagering contracts: "In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable (Thacker *v.* Hardy, *ubi supra*), while generally, in this country, all wagering contracts are held to be illegal and void as against public policy. Dickson's Executor *v.* Thomas, 97 Penn. St. 278; Gregory *v.* Wendell, 40 Mich. 432; Lyon *v.* Culbertson, 83 Ill. 33; Melchert *v.* American Union Telegraph Co., 3 McCrary, 521; s. c. 11 Fed. Rep., 193 and note; Barnard *v.* Backhaus, 52 Wis. 593; Kingsbury *v.* Kirwan, 77 N. Y. 612; Story *v.* Saloman, 71 N. Y. 420; Love *v.* Harvey, 114 Mass. 80." In considering how far brokers would be affected by the illegality of contracts made by them, that court says: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis,* and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." This was decided in Embrey *v.* Jemison, 131 U. S. 336. See also Kahn *v.* Walton (Ohio, 1888), 20 N. E. Rep. 203; Cothran *v.* Ellis, 125 Ill. 496; Farcira *v.* Gabell, 89 Penn. St. 89; Crawford *v.* Spencer; 92 Misso. 498; Lowry *v.* Dillman, 59 Wis. 197; Whitesides *v.* Hunt, 97 Ind. 191; First National Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41; Rumsey *v.* Berry, 65 Maine, 570.

It is not denied that wagering contracts are void by the common law of Massachusetts; but it is argued that they are not illegal, and that, if one pays money in settlement of them at request of another, he can recover it of the person at whose request he pays it. It is now settled here that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal. Bishop *v.* Palmer, 146 Mass. 469; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396. The weight of authority in this country is, we think, that brokers who

knowingly make contracts that are void and illegal as against public policy, and advance money on account of them at the request of their principals, cannot recover either the money advanced or their commissions, and we are inclined to adopt this view of the law. Embrey *v.* Jemison, 131 U. S. 336, *ubi supra,* and the other cases there cited.[1]

We are of the opinion that the instruction of the presiding justice, that on the auditor's report the plaintiffs were entitled to a verdict, cannot be sustained. Whether on the auditor's report the defendants were entitled to a ruling directing the jury to render a verdict in their favor, or whether the case should have been submitted to the jury for the reasons stated in Peaslee *v.* Ross, 143 Mass. 275, is a question which has not been carefully argued, and upon which we express no opinion. *Exceptions sustained.*

BENJAMIN F. PIXLEY ET AL *v.* CHARLES W. BOYNTON ET AL

ILLINOIS SUPREME COURT, September Term, 1875

[*Reported in* 79 *Illinois,* 351]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

This was an action of assumpsit, brought by Charles W. Boynton, George S. Foster, and John S. Miller, partners, against Benjamin F. Pixley, Thomas W. Hall, and Joseph G. Hall, partners, upon a promissory note. The opinion of the court contains a statement of the material facts.

Mr. *Farlin Q. Ball,* for the appellants.

Messrs. *Prentiss & Hooke,* for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the court:—

The judgment in favor of plaintiffs in the court below was for $31.33 in excess of the *ad damnum* in the declaration. That sum had been remitted in this court by plaintiffs before the cause was submitted for decision. Under our present statute this is permissible, and is in accordance with the practice that prevails.

The action is upon a promissory note, and defendants seek to avoid the payment on the ground the consideration is illegal. The special defence set up in the notice filed with the general issue is, that it was given in settlement of "differences" arising out of an optional contract in wheat, made on the board of trade, and that it was not the intention of any of the parties to the transaction to buy or sell, or deliver or receive grain, but their only purpose was to trade in "differences" in the price of grain on the Chicago market.

[1] Phelps *v.* Holderness, 56 Ark. 300; Nat. Bank of Augusta *v.* Cunningham, 75 Ga. 366; Pope *v.* Hanke, 155 Ill. 617; People's Saving Bank *v.* Gifford, 108 Iowa, 277; Rogers *v.* Marriott, 59 Neb. 759, *acc.*

It will not be necessary to discuss the legal proposition, that such contracts are void, as being against a sound public morality, for the reason we do not think any such contracts as defendants insist upon has been proven to have existed between the parties. The burden of proof is upon the defendants to show the consideration of the note is illegal, and they ought, in a case like this, to be required to make this proof by a clear preponderance of the evidence. This they have not done.

The contract was made by Hall, one of the defendants, on behalf of Wallace, who was not himself a member of the board of trade, and could not by its usages make contracts in his own name in relation to transactions on 'change. In June, 1879, Wallace, through Hall, sold to Boynton, for his firm, 5,000 bushels No. 2 spring wheat, at $1.12 per bushel, "seller July." Suddenly the price of wheat went up, and it was thought best to close up the matter. Accordingly, Hall, at the instance perhaps of Wallace, certainly in his interest, bought the wheat back from Boynton at an advance of fourteen cents per bushel. Neither Hall nor his firm had any real interest in the wheat, but as Hall and Boynton were both members of the board of trade, and as the contract was made in Hall's name, by his consent, and he was legally obligated to perform it, he would have been expelled had he not, in some satisfactory manner, closed up the matter with Boynton at the maturity of the contract. It was no doubt for this reason, as well as his legal liability, his firm gave the note upon which this action was brought.

A number of witnesses familiar with the rules of the board of trade were examined, and they all say this contract was in conformity with the custom of trade, and was a regular and legitimate contract. "Seller" the month, as that term is understood and used on the board of trade, is explained to mean the seller has until the last day of the month in which to make a delivery of any grain contracted to be sold. Under such a contract as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions.

One witness says, the true idea of an "option" is "puts" and "calls." A "put" is defined in the evidence to be "a privilege of delivering or not delivering the grain," and a "call" is "a privilege of calling or not calling for the grain." The contract between the parties to this transaction was not an optional one, in the sense of "puts and calls." The only option the seller had was as to the time of the delivery. The legal effect of his agreement was that he should deliver the grain contracted to be sold within a limited period.

Whatever may have been the intention of Hall or Wallace, it

seems clear that Boynton understood he was to have the grain at the maturity of the contract. His good faith was manifested, in that, immediately upon selling the grain back to Hall, for Wallace, he purchased a like amount at the price he had sold, and upon the maturity of the contract, took the wheat and paid for it. Plaintiffs were extensively engaged in shipping grain, as shown by the testimony. Boynton emphatically declares this was not a gambling transaction, so far as he was concerned, but that the grain was purchased in good faith for the legitimate purposes of commerce. There is nothing in the record to overcome his testimony in this regard.

The intention of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.

A *remittitur* having been entered, there is now no error in the record, and the judgment will be affirmed to the extent of $1000. But because there was error in the record before the *remittitur* was entered, all costs accruing in this court up to the date of entering the *remittitur* and the costs of entering the same, will be taxed against appellees. *Judgment affirmed.*[1]

WINCHESTER *v.* NUTTER & ANOTHER

New Hampshire Supreme Court, December 1872

[*Reported in* 52 *New Hampshire,* 507]

Assumpsit, by Cummings M. Winchester against Oscar Nutter and Elden Farnham, upon an account annexed, "for furnishing twenty four suppers, at your request, at seventy-five cents each, price agreed, $18." It appeared, in evidence, that the plaintiff and two defendants and several others met one evening at a schoolhouse in Lancaster, for the purpose of considering the subject of having a squirrel hunt in that neighborhood. The plaintiff was chosen chairman of the meeting. The two defendants were chosen as the leaders of the two opposite sides, called "captains," and accepted that place. They

[1] Grizewood *v.* Blane, 11 C. B. 526; Clews *v.* Jamieson, 182 U. S. 461, 489; Hentz *v.* Jewell, 20 Fed. Rep. 592; Bennett *v.* Covington, 22 Fed. Rep. 816; Bangs *v.* Hornick, 30 Fed. Rep. 97; Hill *v.* Levy, 98 Fed. Rep. 94; Flowers *v.* Bush &c. Co., 254 Fed. Rep. 519; Robson *v.* Weil, 142 Ga. 429; Scanlon *v.* Warren, 169 Ill. 142; Vigel *v.* Gatton, 61 Ill. App. 98; Whitesides *v.* Hunt, 97 Ind. 191; Sondheim *v.* Gilbert, 117 Ind. 71; Murray *v.* Ocheltree, 59 Iowa, 435; Sawyer *v.* Taggart, 14 Bush, 727; Rumsey *v.* Berry, 65 Me. 570, 573; Dillaway *v.* Alden, 88 Me. 230; Barnes *v.* Smith, 159 Mass. 344; Davy *v.* Bangs, 174 Mass. 238; Gregory *v.* Wendell, 40 Mich. 432; Donovan *v.* Daiber, 124 Mich. 49; McCarthy *v.* Weare Commission Co., 87 Minn. 11; Clay *v.* Allen, 63 Miss. 426; Rogers *v.* Marriott, 59 Neb. 759; Botts *v.* Mercantile Bank, 170 N. Y. App. D. 879; Dows *v.* Glaspel, 4 N. Dak. 251, *acc.* Medlin Milling Co. *v.* Moffatt Commission Co., 218 Fed. Rep. 686 (Mo.); Taylor *v.* Sebastian, 158 Mo. App. 147; McGrew *v.* City Produce Exchange, 85 Tenn. 572, *contra.*

then chose sides, each captain selecting his men alternately, until there were twelve on each side, including the captains. They agreed to have a squirrel hunt, the hunting to begin and close at a fixed time, — after the close of which the game was to be counted according to certain prescribed rules, and the side that got beat was to pay for the suppers for both sides, it being arranged that, in the end, the captains should pay no more than each other man on his side; that each man on the side that got beat should pay for his own supper and for that of one man on the side that beat. The question submitted to the jury was as to what was the contract made with the plaintiff, who agreed to furnish the suppers for the whole. The jury found that the contract was that the two captains (the defendants) engaged the suppers, and were to be responsible to the plaintiff for the whole of them, and the matter was to be afterwards adjusted between the captains and their men. It appeared that the plaintiff knew and understood fully all these arrangements as to how the supper was to be paid for in the end.

The defendants moved the court to nonsuit the plaintiff, upon the ground that this whole transaction was simply a bet or wager for the suppers, and that the plaintiff's claim in this case "grows out of such bet or wager," under the provisions of ch. 254, sec. 12, Gen. Stats. The court, *pro forma,* overruled this motion, and the defendants excepted.

The question of law thus raised was reserved.

Fletcher & *Heywood* and *E. Fletcher* for the defendants.

Ray & Drew and *G. A. Bingham,* for the plaintiff.

Foster, J. The plaintiff furnished, sold, and delivered to the defendants, at their special request, twenty-four suppers; why should not the defendants pay for them, there being no controversy about the price or the quality of the article furnished?

The plaintiff has fully performed his part of the contract; why should not the defendants perform their part?

Because, they say, that although they have received and eaten the plaintiff's suppers, still those suppers were provided in order to enable certain parties to pay a bet or wager; therefore, the contract for the purchase and sale of these suppers grew out of a bet or wager; and such a contract, they contend, is illegal and void, and in any effort to enforce it, *potior est conditio defendentis.*

If this contract is held void, it can only be on the ground that the wager was illegal, — a violation of law; and that the plaintiff, by contracting to furnish the suppers absolutely, whatever might be the result of the squirrel hunt, for a certain price and payment, absolute and unconditional, to these two defendants, whether they or the party that either one of them represented should be defeated or not in the event of the hunt, aided, abetted, counselled, hired, or procured the commission of a crime or a misdemeanor.

At common law some contracts of wager are valid and some are

void. 2 Pars. on Con. 627, 755. But the common law, allowing actions to be maintained upon a wager in cases not contrary to public policy nor prohibited by statute, has never been adopted in New Hampshire.

Here all wagers are void contracts. Perkins *v.* Eaton, 3 N. H. 152; Hoit *v.* Hodge, 6 N. H. 104. This is not because the contract is to commit or be accessory to a crime or a misdeamor, for a wager contract is neither a crime nor a misdeamor. Mere betting, unconnected with a criminal offence, is no offence against the criminal law. Neither the common law nor any statute of this State affixes any penalty to betting, as a criminal offence, or in any respect a misdemeanor.

The plaintiff presided at the meeting at which the arrangements for the hunt and for the subsequent suppers were made. He knew and understood fully all these arrangements. And so he may be said to have aided and abetted all these transactions. But as the wager was not a misdemeanor, the plaintiff, in aiding the wager, did not aid a misdemeanor.

Here was no offence against the common law. How is the transaction to be viewed in the light of our statutes, and how is it affected by them? The wager contract is simply a void contract.

Section 12 of ch. 254, Gen. Stats., provides that "all bets and wagers upon any question where the parties have no interest in the subject except that created by the wager, are void; and either party may recover any property by him deposited, paid or delivered upon such wager or its loss, and repel any action brought for anything the right or claim to which grows out of such bet or wager."

The contract of wager, then, as between the parties to that contract, the winning and losing parties in the result of the hunt, was a void contract. But it was not void as being an undertaking to violate the law, nor as an undertaking involving any violation of law punishable by a penalty as an offence against the criminal law.

The criminal law does not prohibit the contract. The criminal law is not violated by it. The criminal law affixes no penalty to the making or execution of the contract. The contract is in no way connected with a violation of the criminal law, for betting is not a violation of the criminal law.

Therefore, the doctrine of *particeps criminis* does not arise, and cannot be applied, because there is no *crimen;* no statutory nor common law offence, no municipal regulation nor ordinance, — nothing but a special statute imposing no penalty by virtue of any criminal process or proceeding, and not declaring a wager to be a misdemeanor, but merely denying a civil remedy and annulling a contract upon grounds of supposed public policy.

What is the public policy? Probably to restrain the tendency to idleness and improvidence, which is likely to be promoted by indulgence in the habit of betting. But public policy has not seemed

to require that such amusements should be punished as a crime or misdemeanor, nor even that they should be so much as forbidden by the language of the law. The act of betting and the contract of wager is, therefore, neither *malum in se,* nor *malum prohibitum,* in the eye or the letter of the law.

Furthermore, as to the public policy, then, of the special statute referred to, which only renders the contract of wager void, its purpose and intent may be gathered from an additional part of the statute; for a subsequent section of the same chapter — section 14 — furnishes a definition of the terms "bet" or "wager," as employed in the previous section. "Any contract or agreement for the purchase, sale, loan, payment, or use of money or property, real or personal, the terms of which are made to depend upon, or are to be varied or affected by, any uncertain event in which the parties have no interest except that created by such contract or agreement, shall be deemed a bet or wager."

Now, it seems very clear that the idea of the special statute, section 12, is to declare void and to annul all contracts, the consideration or performance of which depends upon such an uncertain event as is mentioned in section 14, — that is, where one party's consideration, to be furnished, and the other party's performance or payment is to be furnished or made, according as such uncertain event may happen; in other words, where the contract is to be performed if the uncertain event happen, and not to be performed if it does not happen, or *vice versa.*

The statute, then, evidently applies to a party to the transaction, and under its provisions the losing party may successfully resist an action to recover the money or value of the thing forfeited by the terms of the wager, or any action to recover damages for the nonperformance of any act stipulated to be done, or for the omission of performance of any act stipulated not to be done, or indeed any action founded upon anything growing out of the wager.

And this immunity from liability would probably attach to any person, not directly a party to the wager, who might be so identified with the transaction as that his cause, claim, or rights should grow out of and depend upon the uncertain event which was the subject of the wager.

But, as between the parties to this suit, there was no element of uncertainty involved in *their* contract. The defendants contracted with the plaintiff that he should furnish for them twenty-four suppers, at seventy-five cents each, upon their credit. They agreed to pay for them. This was the whole of the contract. Their own reimbursement was to be regulated independently of their contract with the plaintiff. He was not to gain or lose by the success or the defeat of either party. The consideration for the defendant's promise was the suppers, which the two defendants were to have and dispose of as they might see fit. They might eat the twenty-four

suppers themselves, or give them to their dogs. They were to receive so much food, absolutely and at all events. They, and only they, were to pay the plaintiff for it, absolutely and at all events. There was no element of uncertainty on either side of this contract.

It is said that money lent for the purpose of betting cannot be recovered by the lender of the borrower: Peck *v.* Briggs, 3 Denio. 107; Ruckman *v.* Bryan, id. 340: 2 Par. on Cont. 756, note *k;* but that depends entirely upon the question whether the wager was a crime or a misdemeanor, or a contract connected with a violation of law.

So, a note given for money knowingly lent to be applied for the suppression of a prosecution for crime is void: Plummer *v.* Smith, 5 N. H. 553; but, by Richardson, C. J., "it is most unquestionably illegal, in a private individual, to suppress a criminal prosecution."

A bet upon the result of a squirrel hunt is, most unquestionably, not a violation of any law of this State.

The defendants' exception is therefore overruled, and their motion for a *Nonsuit denied.*

WILLIAM S. FERGUSON *v.* ALLEN COLEMAN

South Carolina Court of Appeals, Spring Term, 1846

[*Reported in* 3 *Richardson* (*Law*), 99]

This was an action on an instrument, dated 31st January, 1843, whereby the defendant promised "to pay on the first of January, 1844, to W. S. Ferguson or bearer, nine hundred and two dollars, fifty-eight cents, if cotton should rise to eight cents by the first November next, and if not, to pay five hundred dollars, for value received." It was admitted at the trial that this instrument was given in part payment of a tract of land which the defendant had purchased of the plaintiff; and it was proved on the part of the plaintiff, that between the date of the agreement and the first of November, 1843, the highest prices of cotton were, in Columbia, 8½ and 8¾ cents, and in Charleston, 9 and 9¼ cents.

The defendant contended, 1st, that the agreement was a wager on the price of cotton; 2d, that according to the true construction of the instrument, the defendant was only bound to pay the larger sum, if cotton was selling for eight cents on or near the first of November, and that this had not been shown.

Under the instructions of his Honor the presiding judge, the jury found for the plaintiff the larger sum.

The defendant appealed, and now moved this court for a new trial.

Boyce and Gregg, for the motion.

Curia, *per* Frost, J. The objection chiefly urged against the instructions of the circuit judge, affects the construction of the agree-

ment to pay the larger sum expressed in the note, "if cotton should rise to eight cents by the first of November next." It appeared by admissions at the trial that the defendant was treating with the plaintiff for the purchase of a tract of land; and declining to give the price which the plaintiff asked, it was agreed that the defendant should pay a certain sum if cotton advanced, or less if it did not. The defendant insists that the import of the agreement is, that cotton should rise to eight cents "at or near" the first of November. The various significations to which the necessities of language have applied this and other propositions, would render any construction of the agreement, based on a critical analysis of its meaning, very unsatisfactory. But it may be observed that *by,* in its primitive sense, expresses relation to place; though by various remote and obscure analogies and casual associations, that meaning is variously modified. In relation to place, it clearly does signify "at or near," but its import is more indefinite when used to express the relation of time. In this application it signifies "on or before." Many examples of this sense readily occur. If a contract were made for the delivery of an article, or the completion of work, by a particular time, to be paid for on completion, or delivery, a claim for the price would accrue on performance, whenever that might be; for the agreement provides for a performance and payment before the appointed time, but leaves the time of performance wholly indefinite. It would be more difficult to derive an example of the defendant's construction from the transactions of life. The popular signification of words, that which use has made familiar in the affairs of men, must be adopted in giving construction and effect to their contracts.

The objection to the agreement that it is a wager is plainly inapplicable; for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product.

The motion is dismissed.[1]

[1] Plumb *v.* Campbell, 129 Ill. 101; Wolf *v.* National Bank, 178 Ill. 85; Phillips *v.* Gifford, 104 Iowa, 458; Kirkpatrick *v.* Bonsall, 72 Pa. 155, *acc.* See also United States *v.* Olney, 1 Abb. U. S. 275; Lynch *v.* Rosenthal, 144 Ind. 86; Dion *v.* St. John Baptiste Soc. 82 Me. 319; Miller *v.* Eagle, &c. Ins. Co., 2 E. D. Smith, 268; Dunham *v.* St. Croix Mfg. Co., 34 N. Bruns. 243.

The winner of a race is generally allowed to recover the prize offered. Alvord *v.* Smith, 63 Ind. 58; Moulton *v.* Daviess County Assoc., 12 Ind. App. 542; Delier *v.* Plymouth County Soc., 57 Iowa, 481; Misner *v.* Knapp, 13 Oreg. 135; Porter *v.* Day, 71 Wis. 296; Gates *v.* Tinning, 5 U. C. O. B. 540. See also Harris *v.* White, 81 N. Y. 532; People *v.* Fallon, 152 N. Y. 12; Ballard *v.* Brown, 67 Vt. 586.

SECTION III

CONTRACTS OBSTRUCTING THE ADMINISTRATION OF JUSTICE

(*a*) Champerty and Maintenance

HUTLEY *v.* HUTLEY

In the Queen's Bench, January 24, 1873

[*Reported in Law Reports,* 8 *Queen's Bench,* 112]

Declaration that one John Hutley, a brother of defendant and a cousin of plaintiff, had died, leaving extensive landed estates and large personal property; and defendant was the heir-at-law of the deceased and one of his next of kin; and the deceased died, leaving a will whereby his property real and personal was left to persons other than plaintiff and defendant; and plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to plaintiff; and in consideration that plaintiff would take the necessary steps to contest the validity of the said will, and would advance certain moneys and obtain evidence for such purposes and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, defendant, by reason of the taking of such proceedings for the setting aside such will; and plaintiff took such steps as aforesaid, and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid and defendant became entitled to and obtained possession of large landed estates of the deceased. Allegation of all conditions precedent. Breach that defendant had not paid to the plaintiff half the said personal property or conveyed to him one half of the said real estates.

Demurrer. Joinder in demurrer.

Philbrick (*Pearce* with him), in support of the demurrer.

Day, Q. C. (*Anderson* with him), for the plaintiff.

Blackburn, J. The question is whether the contract disclosed on this declaration is such as can be enforced in a court of law. Putting out of the question, for the moment, the position of the plaintiff, it alleges that the defendant is heir-at-law and one of the next of kin of a deceased person who made a will by which the personal and real estate were left away from the defendant, and in consideration that the plaintiff would take the necessary steps to contest the validity of the will, and would advance certain moneys, and obtain evidence, and instruct an attorney, the defendant promised to pay

to the plaintiff one half of the personal estate, and convey to him a moiety of the real estate which the defendant should recover. If that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal. Sprye *v.* Porter, 7 E. & B. 58, 81; 26 L. J. (Q. B.) 64, 71, was one of the cases cited, and I entirely agree with what is there said. Lord Campbell, delivering the judgment of the court, says: "Here we have maintenance in its worst aspect. The plaintiff and Rosaz, entire strangers to the property which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one fifth of the property when so recovered; and unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney, or to advance money to carry on the litigation; but they are to supply that upon which the event of the suit must depend, *evidence;* and they are to supply it of such a nature and in such quantity as to secure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal; and Stanley *v.* Jones, 7 Bing. 369, is an express authority to that effect." Putting aside that the plaintiff there was an absolute stranger, the present agreement goes further than that, for the present plaintiff agrees to instruct an attorney and advance money, and falls short of it so far that the present plaintiff only agrees to obtain evidence, whereas in Sprye *v.* Porter, 7 E. & B. 58; 26 L. J. (Q. B.) 64, the plaintiff undertakes to supply evidence sufficient to ensure success. But the mischief is as great in the one case as in the other, and both agreements are void as amounting to maintenance and champerty.

But then it is argued that the position of the plaintiff with relation to the defendant and the property in question takes it out of the rule against champerty and maintenance. The declaration alleges that the plaintiff was a cousin of the deceased, and so a relation of the defendant, who was the deceased's brother; and the plaintiff's counsel cited cases which he said showed that such relationship prevented an agreement like the present from being illegal. But he produced no authority that blood relationship between the parties made any difference as to champerty. Then the further allegation was relied on, that the plaintiff believed that the will which was to be contested revoked a former will by which the testator

had bequeathed certain property to the plaintiff; and it was argued that because the plaintiff thought he had an interest in the litigation by which the one will was to be upset and the other revived, the agreement was not illegal. But the litigation was to be maintained by the plaintiff, not solely, as far as he was concerned, for any benefit he might directly or indirectly derive himself from upsetting the will, but the bargain was that he would maintain the action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the litigation. While, therefore, I incline to agree with every word that is said by Lord Abinger and Lord Cranworth in Findon *v.* Parker, 11 M. & W. 675, 679, that an agreement to assist in bringing an action is not made maintenance by the fact that the party turns out to be mistaken in supposing that he had a common interest with the litigant parties in the result of the suit, I cannot see that that case is any authority for the present plaintiff. If every word that is said in the declaration about the plaintiff's belief in his interest in the subject-matter of the suit were true, that would not justify or make legal the agreement to share in the property to be recovered by the defendant. There must, therefore, be judgment for the defendant.

Lush, J. I am of the same opinion. It is conceded by the plaintiff's counsel that if it were not for the plaintiff's interest the contract in the declaration would amount to champerty. First, the plaintiff is a cousin of the deceased; that would give him no interest. Nor would the relationship to the defendant justify an agreement of champerty. Then there is the allegation that the plaintiff believed that the will revoked a former will by which the testator had bequeathed certain property to the plaintiff, and assuming that this shows that the plaintiff had, or thought he had, a collateral interest in contesting the will, that collateral interest would not justify an agreement to share the property which the defendant should acquire by successfully contesting the will. There are cases which show that there are circumstances which may justify a person in maintaining, that is, in assisting, one of the litigant parties in a suit; certain relationship would justify maintenance; but I know of no case, and Mr. Day has not produced the semblance of an authority for saying that relationship or collateral interest justifies champerty. Therefore the additional allegations in the declaration do not make the agreement good.

Archibald, J. I am also of opinion that the declaration is bad. It does not show any circumstances, either on the ground of relationship or interest, to make the agreement good. There are cases to show that a common interest, or even a *bona fide* belief in the existence of a common interest,[1] would justify the mere maintenance

[1] Or motives of charity: Harris *v.* Brisco, 17 Q. B. D. 504. See further, Alabaster *v.* Harness, [1895] 1 Q. B. 339; Breay *v.* Royal Assoc., [1897] 2 Ch. 272.

of the suit; but they go no further. The present case falls within the principle of Sprye *v.* Porter, 7 E. & B. 58; 26 L. J. (Q. B.) 64:

Judgment for the defendant.

MONTRAVILLE ACKERT *v.* ALFRED R. BARKER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, September 27–October 10, 1881

[*Reported in* 131 *Massachusetts,* 436]

CONTRACT for money had and received. The answer set up that the defendant was an attorney at law, and as such was employed by the plaintiff to collect certain sums of money from certain insurance companies; "that the plaintiff agreed, in consideration of the defendant acting for him in the premises, that said defendant should, out of any and all moneys received by him from said insurance companies, retain one half of the amount received after payment of proper costs and charges;" admitted the receipt of a certain sum from the insurance companies; and averred that the defendant had the right to retain out of it the costs and expenses and one half of the sum remaining after deducting such costs and expenses. Trial in the Supreme Court, before Allen, J., who allowed a bill of exceptions, which, after stating that the pleadings were a part thereof, was in substance as follows:—

The defendant admitted the receipt of $836 from two insurance companies, but contended in his answer that the plaintiff could rightfully demand of him only half the whole sum collected, less costs of the suits brought to enforce the demands on which the said collections were made, because the plaintiff promised to allow him one half the amount recovered, in consideration for professional services rendered in this behalf; that he had a right, under such agreement, to stop out or retain such sum; and his testimony was to that effect. He also testified that said agreement did not require him to bear or be responsible for the expenses of said suits.

The defendant asked the judge to rule as follows: "1. If it appears that the percentage mentioned in the alleged agreement amounted only to a measure of compensation in the event of a successful termination of the suits, in distinction from an indefinite fee to be charged in the event of the unsuccessful termination of the suits, then the contract is not champertous, and it can be enforced. 2. If,

[1] Munday *v.* Whissenhunt, 90, N. C. 458, *acc.* The English laws of maintenance and champerty are not in force in India, and a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, is not necessarily to be regarded as opposed to public policy. But such agreements should be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid. Ram Coomar Coondoo *v.* Chunder Canto Mookerjee, 2 App. Cas. 186.

under the terms of the agreement, the defendant had a right to stop out of, or retain from, the funds collected one half the total sum for professional services, and actually had stopped out such sum prior to any notice to him that the contract was abrogated by the plaintiff, then the transaction was so far closed in that behalf that the plaintiff cannot avoid or undo the same."

The judge refused to give either of the rulings asked for, but instructed the jury that, if they found there was an agreement by which the defendant was entitled to retain one half the sum collected as compensation for services, such agreement was unlawful, and would not avail the defendant in this action.

The jury returned a verdict for the plaintiff in the sum of $808.04; and the defendant alleged exceptions.

H. C. Bliss, for the defendant.

H. C. Strong (E. H. Lathrop with him), for the plaintiff.

GRAY, C. J. The defendant's answer and bill of exceptions, fairly construed, show that the agreement set up by the defendant was an agreement by which, in consideration that an attorney should prosecute suits in behalf of his client for certain sums of money, in which he had himself no previous interest, it was agreed that he should keep one half of the amount recovered in case of success, and should receive nothing for his services in case of failure.

By the law of England, from ancient times to the present day, such an agreement is unlawful and void for champerty and maintenance, as contrary to public justice and professional duty, and tending to speculation and fraud, and cannot be upheld, either at common law or in equity. 2 Rol. Ab. 114; Lord Coke, 2 Inst. 208, 564; Hobart, C. J., Box *v.* Barnaby, Hob. 117 *a;* Lord Nottingham, Skapholme *v.* Hart, Finch, 477; s. c. 1 Eq. Cas. Ab. 86, pl. 1; Sir William Grant, M. R., Stevens *v.* Bagwell, 15 Ves. 139; Tindal, C. J. Stanley *v.* Jones, 7 Bing. 369, 377; s. c. 5 Moore & Payne, 193, 206; Coleridge, J., *In re* Masters, 1 Har. & Wol. 348; Shadwell, V. C., Strange *v.* Brennan, 15 Sim. 346; Lord Cottenham, s. c. on appeal, 2 Coop, temp. Cottenham, 1; Erle, C. J., Grell *v.* Levy, 16 C. B. (N. S.) 73; Sir George Jessel, M. R., *In re* Attorneys & Solicitors Act, 1 Ch. D. 573.

It is equally illegal by the settled law of this commonwealth. Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Met. 489; Swett *v.* Poor, 11 Mass. 549; Allen *v.* Hawks, 13 Pick. 79, 83; Call *v.* Calef, 13 Met. 362; Rindge *v.* Coleraine, 11 Gray, 157, 162; 1 Dane Ab. 296; 6 Dane Ab. 740, 741. In Lathrop v. Amherst Bank, the fact that the agreement did not require the attorney to carry on the suit at his own expense was adjudged to be immaterial. 9 Met. 492. In Scott *v.* Harmon, 109 Mass. 237, and in Tapley *v.* Coffin, 12 Gray, 420, cited for the defendant, the attorney had not agreed to look for his compensation to that alone which might be recovered, and thus to make his pay depend upon his success.

The law of Massachusetts being clear, there would be no propriety in referring to the conflicting decisions in other parts of the country. If it is thought desirable to subordinate the rules of professional conduct to mercantile usages, a change of our law in this regard must be sought from the legislature, and not from the courts.

The defendant, by virtue of his employment by the plaintiff, and of his professional duty, was bound to prosecute the claims entrusted to him for collection, and holds the amount recovered as money had and received to the plaintiff's use. The agreement set up by the defendant, that he should keep one half of that amount, being illegal and void, he is accountable to the plaintiff for the whole amount, deducting what the jury have allowed him for his costs. *In re* Masters, and Grell *v.* Levy, above cited; Pince *v.* Beattie, 32 L. J. (N. S.) Ch. 734.

Of Best *v.* Strong, 2 Wend. 319, on which the defendant relies as showing that, assuming this agreement to be illegal, the plaintiff cannot maintain this action, it is enough to say that there the money was voluntarily paid to the defendant, with the plaintiff's assent, after the settlement of the suit by which it was recovered; and it is unnecessary to consider whether, upon the facts before the court, the case was well decided. *Exceptions overruled.*

MARK A. BLAISDELL *v.* HONORA AHERN

SUPREME JUDICIAL COURT OF MASSACHUSETTS,
January 20–May 7, 1887

[*Reported in* 144 *Massachusetts,* 393]

W. ALLEN, J. This is an action by an attorney at law to recover for professional services. The only question argued is, whether the services were rendered under a contract illegal for champerty or maintenance, so that no compensation can be recovered for them.

The parties were residents of this Commonwealth. The defendants were children of a father who had been a stranger to his family for years. They earned their living as domestic servants, and one or both of them had lived in the family of which the plaintiff was a member, and had known him from boyhood. They heard that their father had died in New Hampshire, leaving property there, and consulted the plaintiff in regard to recovering it, and gave him a power of attorney to collect their shares of it. They had no means except their earnings, and were unable to defray the expense of legal proceedings. The plaintiff orally agreed with them to take charge of their case upon the terms that they should furnish money for all actual expenses, and that, in the event of success, he should charge more for his services than if he was sure of his pay at the outset. The plaintiff rendered services under this agreement.

The defendants' case was tried In the Probate Court in New Hampshire, and a decision rendered adverse to them, and an appeal was taken to the Supreme Court. Pending this appeal, there was some difference between the defendants and the counsel employed in New Hampshire, and he withdrew from the case, but was persuaded by the plaintiff to return; and, in consequence, a written agreement was signed by the defendants, which recited that they had retained the plaintiff and authorized him to retain counsel in New Hampshire, and that "said counsel and attorney are to depend upon the contingency of success for the fees for all services rendered in and about said prosecution." The contract also contained the agreement that the plaintiff and the counsel employed "shall in view of the uncertainty of the result in their payment be entitled to very large and liberal fees, in no event to exceed fifty per cent of the amount collected by them, and that we [the defendants] will furnish all the evidence and pay all the actual costs in the prosecution of said claims." The defendants afterward, without notice to the plaintiff, employed other counsel, and, on trial recovered $9300.

According to the terms of this agreement, the plaintiff could unquestionably have maintained an action against the defendants for his fees, if successful in the suit. In that event, he "is to be entitled to very large and liberal fees," for which he would have a right of action against the defendants. This is inconsistent with a champertous agreement, an essential element of which is a sharing in the fruits of the litigation. There was no agreement that the plaintiff should receive a share of the amount recovered as compensation for his services. It is immaterial that the avails of the suit were the means or the security on which he relied for payment, if it was to be payment of a debt due from the defendants. Thurston *v.* Percival, 1 Pick. 415. Lathrop *v.* Amherst Bank, 9 Met. 489.

Ackert *v.* Barker, 131 Mass. 436, and Belding *v.* Smythe, 138 Mass. 530, are cases of champerty, where a part of the amount recovered was to be received in compensation for services, and there was to be no personal liability. Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pleading the avails of the suit, or a part of them, as security for payment, the agreement is not champertous. Tapley *v.* Coffin, 12 Gray, 420; Scott *v.* Harmon, 109 Mass. 237; McPherson *v.* Cox, 96 U. S. 404; Christie *v.* Sawyer, 44 N. H. 298; Anderson *v.* Radcliffe, E., B. & E. 806, 817.

We do not see anything in the agreement which renders it void for maintenance. In a sense, a lawyer may be said to maintain another in a suit when he gives his advice or services, as formerly it would have been maintenance for a layman to do so; but such acts have long since ceased to be unlawful, and it would now nowhere be held to be in itself unlawful for a lawyer to give his services to prosecute a suit, with the understanding that his services are to be

free unless success shall give to his client the ability to pay him, and that in that case he will expect liberal feees. There may be circumstances in which such a contract would be meritorious; and there may be circumstances in which it would partake of the worst evils of maintenance. Under what circumstances a contract of that nature might be held void as against public policy, we need not consider. The contract under consideration was nothing more than an agreement by the plaintiff to give his services without charge if the suit should not be successful, and and agreement by the defendants to pay large and liberal fees if successful; and we know no authority and no reason in public policy why, under the relations and circumstances of the parties, it is not a lawful contract, which they had a right to enter into. We think that the ruling, as matter of law, that the action could not be maintained, was wrong.

New trial granted.[1]

CHARLES THOMPSON *v.* JOSEPH S. REYNOLDS

ILLINOIS SUPREME COURT, September Term, 1874

[*Reported in* 73 *Illinois,* 11]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, judge, presiding.

Messrs. Merriam and *Alexander,* for the appellants.

Mr. John C. Richberg, for the appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:—

Some time in the latter part of the year 1868, appellee and his partner were consulted by appellants as to whether they should execute a release, without consideration, of certain property mentioned in the deed. The partner advised that they had no interest, and could do so without prejucidice to their rights; but, subsequently, another quitclaim deed was, in like manner, presented for a large amount of property. Appellee was then applied to for further advice, when he, with appellant Charles Thompson, consulted with one James Dunne, also an attorney, who occupied the same office with appellee. They investigated the matter and arrived at the conclusion that appellants had an interest in the property.

An agreement was soon after entered into between appellants and appellee, by which appellee was to institute all necessary proceedings to ascertain and fix the rights of appellants; that he should pay all unnecessary expenses, and receive one half of whatever should be realized. Appellants agreed that they would do no act to interfere with the proceedings. It is claimed that, with the consent of the parties, appellee agreed with Dunne he should assist in prosecuting the claims, for which he was to receive one half of appellee's moiety, being one fourth of what should be recovered.

[1] See further, Davis *v.* Commonwealth, 164 Mass. 241; Hadlock *v.* Brooks, 178 Mass. 425; Taylor *v.* Rosenberg, 219 Mass. 113; Butler *v.* Legro, 62 N. H. 350.

Soon after, proceedings were commenced in the Circuit, the Superior, and the County courts by these attorneys. During the continuance of these proceedings, it is claimed that about $10,000 was realized by appellants executing releases, by way of compromise, with several defendants to the various suits, and it is claimed that these proceeds were divided according to the terms of the agreement.

About the month of May, 1871, appellants, it is claimed, without the consent of appellee or of Dunne, terminated the several proceedings and conveyed the lands in litigation, in consideration of $7,500 actually paid to them; and to recover one half of that sum this action was brought. A trial by the court and a jury was had, resulting in a verdict of $1,500 in favor of plaintiff, on which a judgment was rendered and this appeal prosecuted.

A number of errors are assigned on the record, but in the view we take of the case, we shall only consider whether the judgment is against the law. The court was asked to instruct the jury that the agreement entered into was champertous and void, but the court below refused to give the instruction. Blackstone defines champerty (vol. iv. p. 135) as "a species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partiere,* to divide the land or other matter sued for between them, if they prevail at law, whereupon the champerter is to carry on the party's suit at his own expense." The same author informs us that the punishment, if a common person, for champerty, was by fine and imprisonment; and this was a misdemeanor, punishable at the common law. See Hawk. Pleas of the Crown, vol. i. p. 463. It was also prohibited by various ancient statutes, commencing as early as the Statute of Westminster 1, ch. 25, all of which enact heavy penalties for their violation.

It thus appears that champerty was an offence at the common law, and our General Assembly having adopted the common law of England as the rule of decision, so far as applicable to our condition, until modified or repealed, this must be regarded as in force in this State, as affecting all such contracts, and as being opposed to sound public policy. It is certainly applicable to our condition so far as it relates to attorney and client, and contracts with intermeddlers and speculators in apparently defective titles to property. If allowed to be practised by attorneys, it would give them an immense advantage over a client. The superior knowledge of the attorney of the rights of the client would give him the means of oppression, and acquiring great and dishonest advantages over the ignorant and unsuspecting owner of property. By giving false advice, the attorney, owing to the confidence his client reposes in him, and to his superior knowledge, would have the client completely at his mercy, and would thus be enabled to acquire the client's property in the most dishonorable manner. To allow champerty would be to permit temptation to the avaricious and unscrupulous in the profession,

that would, from the very nature of things, lead to great abuses and oppression.

Whilst the great body of the profession are honest, and understand and act on the duties devolving upon them, there necessarily must be, in this as in all ages of the past, some who gain admission that have neither the integrity nor sense of duty necessary to restrain them from dishonorable means in practice. Usually a person will not employ an attorney unless he feels assured of his honesty as a man as well as his ability as an attorney. Having this confidence, all must see at a glance that it would give the attorney immense power over the client, and with this power all must see that to permit him to make champertous contracts would be to place the client in the power of the attorney. Professional duty requires that advice given should be honest, fair, and unreserved; but where the weak in morals or the vicious are consulted, and they see and determine to embrace the opportunity to make a champertous contract, how can we expect them to give fair, honest, and unreserved advice at the commencement, or in conducting the litigation? The just, the good and upright require no restraints, but the vicious or immoral should be freed from temptation.

At all times in the past champerty has been found a source of oppression and wrong to the property owner, and a great annoyance to the community. To allow it to attorneys, with a portion, but it is believed the number would be small, there would be strong temptation to annoy others by the commencement of suits without just claim or right, merely to extort money from the defendant in buying his peace. Such practices have been denominated as a crime *malum in se*. And such extortion from others, or by the oppression of a client, is unquestionably a great moral delinquency, that no government regardful of the rights of its citizens should ever tolerate. We see that it is as liable now to abuse as it ever was, and would be as injurious to our community as to other communities in the past. And this court has repeatedly held that common law misdemeanors may be punished in this State, unless abrogated by statutory enactment.

Then, has this common law offence been repealed? We think not. The General Assembly has defined the offences of barratry and maintenance, but the offence of champerty is not named; and as, at common law, all three of these offences were regarded as separate and distinct, and as the British Parliament enacted separate laws in reference to each, and as they were enforced by distinct proceedings, we may regard them as different offences, although champerty is said to be a species of maintenance. Then, if the 108th section of the Criminal Code would not embrace this offence, it is in force as a common law misdemeanor, and we do not see that it does.

But it is said that the case of Newkirk *v.* Cone, 18 Ill. 49, has determined that there is no law in this State against champerty; but

this is manifestly a mistake. In that case there seems, at first, to have been a champertous agreement, but it was abandoned by the parties by mutual consent. Cone then went on and rendered services, and sued for professional services in prosecuting and defending causes, also for examining records in public offices, abstracting title to lands, drawing, copying, and engrossing conveyances, deeds, and writings, for journeys and purchasing lands, and for work and labor. Thus, it will be seen that, although it may have been argued, the question of maintenance or champerty was not before the court, but simply whether an attorney may recover a fair compensation for professional services and labor performed as an agent; and it is held that a contract of hiring, for the purpose of investigating title, and making purchases, and rendering legal services in settling titles to land thus purchased, was legal, and the person employed could recover for such services. It is true that the court refer to the ancient common law and British statutes to show that the contract of the parties then before the court was not affected by them. It was also shown that our statute against maintenance did not embrace that contract. There, a person desiring to purchase lands employed an attorney to examine title, to give him an opinion as to its validity, and when purchased to litigate against conflicting titles, which was held not to be maintenance. That case is essentially different from this, both in its facts and on principle, and for these reasons it cannot be regarded as an authority in favor of appellee in this case.

This court has held in Gilbert *v.* Holmes, 64 Ill. 548, and Walsh *v.* Shumway, 65 Ill. 471, that similar contracts were tainted with champerty, and could not be enforced.

According to the doctrine of the case of Scoley *v.* Ross, 13 Ind. 117, there can be no question that this contract is champertous, according to the doctrine of the courts of this country. That case refers to and reviews a large number of American decisions on this question, and carries the doctrine to the full extent of the English rule.

It was the policy of the common law to protect presons from harassing and vexatious litigation. Hence, it would not permit a person having no interest in the subject-matter of the litigation to intermeddle or to become interested in the suit of another, unless it was an attorney, who could only have and demand a fee for his services, and that not in a portion of the things in dispute. In the absence of such a rule, great wrong would necessarily be inflicted on the community.

On a consideration of all the authorities, we are clearly of opinion that this contract, however honestly entered into and carried out, was void, and that the judgment of the court below should be reversed and the cause remanded. *Judgment reversed.*[1]

[1] "It is next urged that the contract is champertous and void, as against public policy. It is true that the land in question was in the possession of Kerr at the time the contract involved was entered into, and the contract provided that the litigation should be carried on, and Beckwith, Ayer, and Kales were to render the professional

N. HILL FOWLER, Appellant, *v.* CHARLES T. CALLAN et al., Respondents

New York Court of Appeals, April 19–June 1, 1886

[*Reported in* 102 *New York,* 395]

Appeal from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made at the January term, 1884, which affirmed judgments in favor of defendants, entered upon an order dismissing the complaint on trial. (Reported below, 12 Daly, 263.)

This was an action of ejectment to recover an undivided half of certain premises to which plaintiff claimed title under a deed from defendant Callan. The plaintiff is an attorney at law, and the deed was delivered to him in pursuance of a contract, the substance of which is stated in the opinion.

Scott Lord, for appellant.

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services, and were to receive one fourth of what should be realized for such services. If an agreement of this character, entered into between attorney and client, is champertous, then the point is well taken; but as we understand the law, the contract lacked one essential element to render it champertous, and that is, that the attorneys should prosecute the litigation at their own costs and expense. Had the contract provided that the attorneys should carry on the litigation for a share of what they might recover, at their own cost and expense, then the contract might have been champertous and void. Thompson *v.* Reynolds, 73 Ill. 11; Park Commissioners *v.* Coleman, 108 id. 601. Such, however, is not the case. The written contract, which alone fixes and determines the rights and duties of the parties, contains no provision whatever requiring the attorneys or the park commissioners to pay the costs or expenses of the litigation. The fact that the park commissioners may have advanced Phillips money which was used in the prosecution of the litigation, has no bearing on the question." Phillips *v.* South Park Commissioners, 119 Ill. 626, 635.

This test is that usually adopted. Peck *v.* Heurich, 167 U. S. 624; McPherson *v.* Cox, 96 U. S. 404; Jeffries *v.* Mutual Ins. Co., 110 U. S. 305; Muller *v.* Kelly, 116 Fed. Rep. 545; Keiper *v.* Miller, 68 Fed. Rep. 627; Swanston *v.* Morning Star Mining Co., 13 Fed. Rep. 215; Wheeler *v.* Pounds, 24 Ala. 472; Stanton *v.* Haskin, 1 McArthur (D. C.), 558; Johnson *v.* Van Wyck, 4 D. C. App. 294; Moses *v.* Bagley, 55 Ga. 283; Meeks *v.* Dewberry, 57 Ga. 263; Taylor *v.* Hinton, 66 Ga. 743; Johnson *v.* Hilton, 96 Ga. 577; Coleman *v.* Billings, 89 Ill. 183; Geer *v.* Frank, 179 Ill. 570; Hart *v.* State, 120 Ind. 83; Clancy *v.* Kelly, 182 Iowa, 1207; Atchison, &c. Railroad Co. *v.* Johnson, 29 Kan. 218, 227; Aultman *v.* Waddle, 40 Kan. 195; Newport Rolling Mill Co. *v.* Hall, 147 Ky. 598; Holloway *v.* Dickinson, 137 Minn. 410; Shelton *v.* Franklin, 224 Mo. 342; Coughlin *v.* Railroad Co., 71 N. Y. 443; McCoy *v.* Gas Engine Co. 152 N. Y. App. D. 642, 208 N. Y. 631; Hayney *v.* Coyne, 10 Heisk, 339; Weakly *v.* Hall, 13 Ohio, 167; Brown *v.* Ginn, 66 Ohio St. 316; Chester Co. *v.* Barber, 97 Pa. 455; Perry *v.* Dicken, 105 Pa. 83; Martin *v.* Clarke, 8 R. I. 389; Nelson *v.* Evans, 21 Utah, 202; *In re* Aldrich, 86 Vt. 531; Nickels *v.* Kane's Adm., 82 Va. 309; Dockery *v.* McLellan, 93 Wis 381, *acc.* See also Casserleigh *v.* Wood, 119 Fed. Rep. (C. C. A.) 308.

If the agreement provides that the owner of the right of action shall not compromise or settle the claim, the provision has been held to make the contract illegal. Foster *v.* Jacks, 4 Wall. 334; North Chicago R. R. Co. *v.* Ackley, 171 Ill. 100; Elwood *v.* Wilson, 21 Iowa, 523; Boardman *v.* Thompson, 25 Iowa, 487; Huber *v.* Johnson, 68 Minn 74. But see Hoffman *v.* Vallejo, 45 Cal. 564; P. C. C. & St. L. Ry. Co. *v.* Volkert, 58 Ohio St. 363; Ryan *v.* Martin, 16 Wis. 57; Kusterer *v.* Beaver Dam, 56 Wis 471.

J. Adolphus Kamping, for respondent Callan.

Quentin McAdam, for respondents Kelly and Griffin.

FINCH, J. It does not affect the validity of the contract between the attorney and his client that, measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation; for neither doctrine now prevails except so far as preserved by our statutes. Sedgwick *v.* Stanton, 14 N. Y. 289. The attorney may agree upon his compensation, and it may be contingent upon his success, and payable out of the proceeds of the litigation. Such contracts are of common occurrence, and while their propriety has been vehemently debated, they are not illegal, and when fairly made are steadily enforced. In substance that was the contract here made, and there would be no question about it had it not contained a provision by the terms of which the attorney not only agreed to rely upon success for his compensation, but also to assume all costs and expenses of the litigation and indemnify his client against them. It is this feature of the contract which raises the question necessary to be determined.

The facts of the case are not very fully developed, but appear to be that the defendant as devisee under a will was entitled to certain real estate,—his right dependent upon the validity of the will, and in some manner threatened by proceedings before the surrogate which put his interest in peril, and made a defence essential to its protection. In this emergency he sought the aid and professional service of the plaintiff and retained him as attorney. The latter neither sought the retainer, nor did anything to induce it. So far as appears, it was not occasioned by any offer or solicitation of his, but originated in the free and unbribed choice of the client. The evidence does not show whether the latter had gained possession of the land devised or was out of possession, but he gave to the attorney a deed of the one undivided half part of the property, taking back his covenant to conduct the defence to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability. The agreement appears to have been purely one for compensation. If the client had given to the attorney money instead of land, the contract would have differed in no respect except the contingent character of the compensation. The arrangement contemplated success in the litigation, in which event the land would pay the costs and expenses and the attorney's reward, and both would be discharged out of the property of the client placed in the hands of the attorney for that precise purpose. The contract in no respect induced the litigation. That was already begun and existed independently of the agreement, and originated in other causes. It did not tend to prolong the litigation. It made it to the interest of the attorney to close it as briefly and promptly as possible, and at as little cost and expense as prudence would permit. The plaintiff, therefore, stirred up no strife, induced no litigation, but merely

agreed to take for his compensation so much of the value of the land conveyed to him as might remain out of that value after the costs and expenses had been paid. We do not think the statute condemns such an agreement. 3 R. S. [6th ed.] 449, §§ 59, 60; Code, §§ 73, 74. The Code revision changed somewhat the language of the prohibition, but, nevertheless, must be deemed a substantial re-enactment of the earlier sections. Browning *v.* Marvin, 100 N. Y. 144, 148. They forbid, first, the purchase of obligations named by an attorney for the purpose and with the intent of bringing a suit thereon; and, second, any loan or advance, or agreement to loan or advance, "as an inducement to the placing, or in consideration of having placed in the hands of such attorney," any demand for collection. The statute presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney, and in which the latter by officious interference procures the suit to be brought and obtains a retainer in it. The statute speaks of a "demand" which by enforcement will end in a "collection"; phrases which have no aptness to the situation of one simply defending a good title to land against the efforts of others seeking to destroy the devise under which he claims. The plaintiff made no "loan or advance" in any proper sense of those words. They imply a liability on the part of the client to repay what was thus lent or advanced. The attorney loaned nothing, and he advanced nothing to the client which the latter was bound to reimburse. Simply he was paid in advance an agreed price, taken in land instead of money, and out of which he was first to pay costs and expenses. The facts before us are not within the terms of the statutes as it respects a "demand" which is the subject of "collection"; but our conclusion rests more strongly upon the conviction that the agreement made was one for compensation merely, and had in it no vicious element of inducing litigation or holding out bribes for a retainer.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur. *Judgment reversed.*[1]

[1] See further Weeks *v.* Cattell, 125 N. Y. App. D. 402, 193 N. Y. 681; Dennin *v.* Powers, 96 N. Y. Misc. 252.

In Taylor *v.* Bemiss, 110 U. S. 42, 45, the Court said: —

"It remains to be considered whether there is in this contract of employment anything which, after it has been fully executed on both sides, should require it to be declared void in a court of equity, and the money received under it returned. It was decided in the case Stanton *v.* Embrey, 93 U. S. 548, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the government

LEONARD W. GAMMONS *v.* GUSTAF JOHNSON

MINNESOTA SUPREME COURT, April 26, 1899

[*Reported in* 76 *Minnesota*, 76]

MITCHELL, J.[1] . . . The complaint in this case is silent as to any special contract between the defendant and either the plaintiff or Huber. For his first and second causes of action, the plaintiff alleges generally the performance of professional services, and the expenditure of money by the plaintiff for the defendant at his instance and request. For his third and fourth causes of action, he alleges generally the performance of certain labor and services, and the expenditure of certain moneys by Huber for the defendant at his special instance and request, which claims had been assigned by Huber to the plaintiff.

In his answer, the defendant, among other things, denied that he ever employed or requested the plaintiff to perform any services for him, or that plaintiff ever did perform any. The answer further alleged, and upon the trial the defendant offered to prove, that, in the spring of 1896, plaintiff and Huber (who was a layman) entered into an agreement or arrangement whereby Huber and one Mossberg, as the agent of plaintiff and Huber, were to go through certain counties in the northern and western part of the State to seek out claims, and instigate suits against the Great Northern Railway Company for damages resulting to different parties from the failure of the railroad company to fence its track across the land of such parties, and when they discovered any such claim, to procure the party having the claim to bring suit against the railroad

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justifies a liberal compensation in successful cases, where none is to be received in case of failure.

"Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights.

"This, however, does not remove the suspicion which naturally attaches to such contracts, and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved.

"While fifty per cent seems to be more than a fair proportion in the division between client and attorney in an ordinary case, we are not prepared to assume that it is extortionate for that reason alone, and the testimony of the lawyers on that subject, taken as experts, does not justify such a conclusion. In the case before us, it is beyond dispute that the attorneys of Mrs. Bemiss exercised no influence over her whatever in adjusting the amount of the fee stipulated in the agreement. They had never known her until this employment, and it was through no suggestion of theirs or any agent of theirs that she applied to them. Her first letter to them on the subject made the offer of fifty per cent, and no more was asked for by them.

"The evidence of two of the judges who composed the court shows that the case was a difficult and complicated one, and that both Taylor and Wood attended to it vigorously, and gave it much time and attention, and that it was in court a considerable time."

[1] A portion of the opinion and the concurring opinion of CANTY, J., are omitted.

company; that, for the purpose of working up and procuring the institution of such suits, plaintiffs furnished Huber with blank contracts for the parties to execute, which were identical in terms with the contract already referred to between defendant and Huber, of which it was one; that, in pursuance of this agreement, Hubert and Mossberg canvassed some nine counties to seek out and bring to light such claims, and induced seventy-one separate and distinct persons (among others this defendant) to execute such contracts, under which seventy-one suits were instituted against the railroad company by Huber and plaintiff, but in the names of the parties who had executed the contracts, in all of which the plaintiff appeared as attorney; that in these suits the amounts of damages claimed ranged from $400 to $1,500 in each suit, but all of them, except one or two, were settled before the trial by the railroad company with the landowners for from one dollar to five dollars each; that none of these parties would have brought these suits but for the systematic work of the plaintiff and Huber to induce them to do so; and that defendant was one of the parties who was thus induced by Huber to sign a contract authorizing the commencement of a suit against the railroad company. The defendant also offered evidence that at least some of these parties did not know that they had any claim against the railroad company, until so informed by Huber.

All of this evidence was excluded on the objection of the plaintiff; and this ruling is the subject of one of the main assignments of error.

It conclusively appears from the evidence that the suit against the railroad company was instituted in the name of the defendant by Huber or plaintiff, or both, under and in pursuance of the written contract, already referred to, between defendant and Huber; that whatever services or expenditures were performed or made by either of them were in the institution and prosecution of that suit in accordance with the terms of that contract; also that plaintiff was never employed by defendant personally, but, if employed by any one, it was by Huber; and that when plaintiff instituted the suit against the railroad company he knew all about the contract between defendant and Huber, and accepted employment, and did whatever he did, upon the strength of it. It also appears that defendant settled with the railroad company for $100 before the suit was tried.

According to the evidence offered and excluded, plaintiff and Huber, who were strangers to the parties and to the claims which were the subjects of these contracts, and who had no object in intermeddling with the matters, except a speculative one, entered into a systematic scheme to hunt up claims, or supposed claims, against the Great Northern Railway Company, upon which the original holders would probably never have asserted any right or brought any action, and to stir up wholesale litigation, and induce the landowners to allow them to bring actions, by agreeing to prosecute the suits at their own expense, idemnify these clients against the costs and

expenses of litigation, accept for their compensation a share of what might be recovered, and not to charge anything for their services unless they succeeded in collecting the claims, and further attempted to make the contract ironclad by incorporating into it a provision that the clients should not settle with the railroad company without their consent, under the penalty of having to pay them a specified sum, apparently fixed arbitrarily without reference to the value of their services. A course of conduct on the part of either an attorney or layman more obnoxious than this to public policy, as involving champerty, maintenance, and barratry, cannot be well imagined.

The old common-law rules on the subject of champerty have doubtless been much modified, but the essential principle upon which those rules rested, and the evils and abuses at which they were aimed, still exist. The general purpose of the law against champerty and maintenance and barratry was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy. It is doubtless the more modern doctrine that the mere taking a case on a contingent fee does not constitute champerty, and that it is not unlawful for an attorney to carry on a suit for another for a share of what may be recovered, at least unless he assumes the risks of litigation by indemnifying his client against all costs and expenses of the same. But the vice in the conduct of these parties lies deeper and much further back than merely entering into a champertous contract for their compensation for lawful services performed in the prosecution of suits legitimately instituted.

According to the facts alleged and offered to be proved, it consisted of an unlawful and barratrous systematic scheme to work up and institgate wholesale vexatious litigation in the names of parties and concerning subjects to whom and which they were entire strangers, and in which they had no interest, except a speculative one in the pecuniary profit which they might derive form the litigation which they had instigated, and which, in all probability never would have been instituted except for their officious intermeddling. The illegality of the conduct of the parties enters into the very inception of the scheme by which the litigation itself was instigated, and but for which it never would have existed. Even if the special written contracts regarding compensation be set aside or ignored, this original vice, in the very inception of the scheme, would still exist in full force.

To hold that a party can thus illegally stir up and instigate litigation, and yet obtain the benefits of it by ignoring the special contracts, and bringing suit upon a *quantum meruit* for services performed in prosecuting the litigation which he has unlawfully instigated, would be a travesty on justice, and to permit a party to do

indirectly what he cannot do directly.[1] It is unnecessary to consider whether the course of conduct alleged and offered to be proved would be a ground for the disbarment of an attorney. It is, however, so clearly against public policy that the courts ought not to enforce such a contract, or aid a party in recovering the fruits of such a speculative and vicious scheme. If defendant can prove what he alleges in his answer, and what he offered to prove, it would constitute a complete defence to each and all of the causes of action set up in the complaint. It was therefore error for the Court to exclude the evidence.[2]

SMALL *v.* THE C., R. I., & P. R. CO.

IOWA SUPREME COURT, April 6, 1881

[*Reported in* 55 *Iowa,* 583]

[3] THIS is an action to recover the value of a grain elevator, and certain grain and other property which it is alleged were destroyed by fire, set by defendant in operating its railroad. Two causes of action are set out in the petition, one of the said causes being for the destruction of the elevator and one Fairbanks scale, which it is alleged were the property of the Farmers' Union Elevator Company, and that said company, after the said property was destroyed by fire assigned its claim for damages to the plaintiff. The other cause of action is for the loss by fire of other property which it is alleged was owned by the plaintiff.

There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

H. S. Winslow, Smith & Wilson, and *Matt. Phelps,* for appellant.

S. H. Fairall, Bonorden & Ranck, and *John N. Rogers,* for appellee.

ROTHROCK, J. In the seventh division of the answer the de-

[1] Compensation on the basis of *quantum meruit* has sometimes been allowed an attorney who has rendered services under a champertous agreement. Goodman *v.* Walker, 30 Ala. 482, 500; Brush *v.* Carbondale, 229 Ill. 144; Rochester *v.* Campbell, 184 Ind. 421; Caldwell *v.* Shepherd, 6 T. B. Mon. 389; Gammons *v.* Johnson, 69 Minn. 488; *In re* Snyder, 190 N. Y. 66; Stearns *v.* Felker, 28 Wis. 594. See also Merritt *v.* Lambert, 10 Paige, 352, aff'd 2 Denio, 607. But see Ackert *v.* Barker, 131 Mass. 436; Butler *v.* Legro, 62 N. H. 350; Munday *v.* Whissenhunt, 90 N. C. 458; Arlington Hotel Co. *v.* Ewing, 124 Tenn. 536; Roller *v.* Murray, 112 Va. 780. See also Pince *v.* Beattie, 32 L. J. Ch. 734; Grell *v.* Levy, 16 C. B. N. S. 73; Willemin *v.* Bateson, 63 Mich. 309.

[2] Gammons *v.* Gulbranson, 78 Minn. 21, *acc.* See also Alpers *v.* Hunt, 86 Cal. 78; Hirschbach *v.* Ketchum, 5 N. Y. App. Div. 324. Compare Metropolitan Ins. Co. *v.* Fuller, 61 Conn. 252; Vocke *v.* Peters, 58 Ill. App. 338; Wheeler *v.* Harrison, 94 Md. 147. A contract to secure evidence necessary for winning a suit for a fee contingent on success is illegal. Stanley *v.* Jones, 7 Bing. 369; Henderson *v.* Hall, 87 Ark. 1; Luce *v.* Endicott, (Ark.) 224 S. W. 619; Gillett *v.* Board, 67 Ill. 256; Quirk *v.* Muller, 14 Mont. 467; Getchell *v.* Welday, 2 Ohio N. P. 390. But see Casserleigh *v.* Wood, 14 Cal. App. 265.

[3] Only so much of the case is printed as relates to the defence of champerty.

fendant pleaded as a defence that before the commencement of the suit it was agreed, between the plaintiff and his attorneys, that said attorneys should carry on the suit at their own costs and expense, and that they should receive for their services and said costs and expenses about one sixth of the amount of the recovery, if the litigation should prove successful, and if they should fail in the action they should receive nothing. It was averred that said agreement and contract was against the public policy, champertous, and void. There was a demurrer to this division of the answer, which was sustained. To this ruling exceptions were taken, and error is assigned thereon.

That the averments of the answer would be a good defence to an action by the attorneys to recover of the plaintiff upon the alleged contract may, for the purposes of this case, be admitted. But that it can be interposed by the defendant to defeat a recovery by the plaintiff, in his own name, for the damages sustained by him, is quite another question. That there are authorities, the most respectable, which hold that when it appears that a plaintiff is prosecuting an action under a champertous arrangement between himself and his attorney, the action should be abated, must be conceded. But on the other hand there are cases which hold the contrary doctrine. In Hilton *v.* Woods, L. R. 4 Eq. Cas. 432, Malvin, V. C., said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that when the right of the plaintiff, in respect of which he sues, is derived under a title founded in champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that, when a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise."

See also Elborough *v.* Ayres, L. R. 10 Eq. Cas., 367; Whitney *v.* Kirtland, 27 N. J. Eq. 333; Robinson *v.* Beale, 26 Ga. 17.

It seems to us that there is no sound reason nor just principle in a rule which would allow a party to defeat a just cause of action because the opposite party has made a contract with his attorney which is utterly void, and which, therefore, cannot be enforced by either of the contracting parties. As to the defendant in this action, who seeks to avail itself of the illegal contracts, the rights of the parties are the same as if it had never been made. The plaintiff is still the real party in interest. The illegal and champertous contract, being void, divests him of no right. That by reason thereof he should be disabled from asserting his rights, we do not believe. It is enough that the parties to such contracts be authorized to repudiate them, without allowing others to exonerate themselves from just obligations by reason thereof. As is said by Day, J., in Allison *v.* C. & N. W. R. Co., 42 Iowa, 274, "If he (the defendant in the

action) could do so, an unheard-of effect would be given to a void agreement. Suppose a suit upon a promissory note is prosecuted under a champertous arrangement between the plaintiff and his attorney; does this avail the defendant to defeat an otherwise just liability? Will not the law rather compel the defendant to perform his undertakings and leave the question of champerty to be determined between the plaintiff and his attorney?" [1]

(*b*) Agreements to Stifle Prosecution

FLOWER and others *v.* SADLER

In the Queen's Bench Division, Court of Appeal, June 29, 1882

[*Reported in* 10 *Queen's Bench Division,* 572]

Appeal by the defendant from the judgment of Denman, J., in favor of the plaintiffs.

The facts are fully stated in the judgment of Denman, J., 9 Q. B. D. 83; and it is here necessary only to give the following short statement of them:—

Maynard had been employed to collect rents on behalf of the plaintiffs; he failed to account for a large sum, and the plaintiffs threatened to prosecute him for embezzlement. Maynard afterwards indorsed to the plaintiffs certain bills of exchange drawn by him upon, and accepted by, the defendant; the consideration for the defendant's acceptance was the sale to him by Maynard of a share in a patent. The indorsement of the bills of exchange by Maynard to the plaintiffs was not done under the influence of the plaintiffs' threat, and was a free and *bona fide* transaction.

Fullarton, for the defendant. The plaintiffs had threatened to prosecute Maynard for embezzlement. This threat was sufficient to vitiate any security subsequently given by Maynard for the debt due from him; in fact the indorsement of the bills to the plaintiffs

[1] Hilton *v.* Woods, 4 Eq. 432; Burnes *v.* Scott, 117 U. S. 582; Courtright *v.* Burnes, 3 McCrary, 60; Sibley *v.* Alba, 95 Ala. 191; Missouri Pac. Ry. Co. *v.* Smith, 60 Ark. 221; Gage *v.* Downey, 79 Cal. 140; Robinson *v.* Beall, 26 Ga. 17; Ellis *v.* Smith, 112 Ga. 480; Torrence *v.* Shedd, 112 Ill. 466; Stearns *v.* Reidy, 135 Ill. 119; Gage *v.* Du Puy, 137 Ill. 652; Burton *v.* Perry, 146 Ill. 71; Allen *v.* Frazee, 85 Ind. 283; Zeigler *v.* Mize, 132 Ind. 403; Bowser *v.* Patrick, 65 S. W. Rep. (Ky.) 824; Gilkeson Co. *v.* Bond, 44 La. Ann. 481; Brinley *v.* Whiting, 5 Pick. 348; Robertson *v.* Blewett, 71 Miss. 409; Bent *v.* Priest, 86 Mo. 475; Bick *v.* Overfelt, 88 Mo. App. 139; Chamberlain *v.* Grimes, 42 Neb. 701; Taylor *v.* Gilman, 58 N. H. 417; Connecticut Ins. Co. *v.* Way, 62 N. H. 622; Whitney *v.* Kirtland, 27 N. J. Eq. 333; Schwabe *v.* Herzog, 161 N. Y. App. D. 712; Pennsylvania Co. *v.* Lombardo, 49 Ohio St. 1; Potter *v.* Ajax Mining Co., 22 Utah, 273; Irons *v.* Croft &c. Co. (W. Va.), 104 S. E. 111, *acc.* See also Eureau *v.* Rieger, 105 Mo. 682; Cooke *v.* Pool, 25 S. C. 593.

Keiper *v.* Miller, 68 Fed. Rep. 627, 70 Fed. Rep. 128; Greenman *v.* Cohee, 61 Ind. 201; Stewart *v.* Welch, 41 Ohio St. 483; Davy *v.* Aetna L. Ins. Co., 78 Ohio St. 256, 441; Webb *v.* Armstrong, 5 Humph. 379; Hudson *v.* Sheafe, 41 S. Dak. 475; Kelly *v.* Kelly, 86 Wis. 170, *contra.*

was an act done to stifle a prosecution for felony, and therefore the plaintiffs cannot sue upon them; Keir *v.* Leeman, 9 Q. B. 371; Williams *v.* Bayley, L. R. 1 H. L. 200. In giving judgment, Denman, J., relied upon Ward *v.* Lloyd, 7 Scott, N. R. 499; but that case is distinguishable in its facts, and moreover is not binding since Williams *v.* Bayley, L. R. 1 H. L. 200. Further, the learned judge drew a wrong inference as to the facts; the bills of exchange were delivered by the defendant to Maynard to be discounted; they were not accepted by the defendant in payment of a share in a patent sold to him by Maynard.

Finlay, Q. C., was not called upon to argue for the plaintiffs.

Lord Coleridge, C. J.[1] I think that the judgment of Denman, J., is right, and ought to be affirmed. The action is brought upon three bills of exchange. The defendant has alleged that he handed them to Maynard in order to be discounted, but Denman, J., has found that the bills of exchange were accepted upon a good consideration, that is, for the purchase of a share in a patent. Maynard had been employed in a situation of trust, and had been guilty of a breach of duty; the plaintiffs had threatened him with a prosecution, and had used strong expressions with reference to his conduct. The bills were then delivered over to the plaintiffs. The question is, whether a defence arises upon these facts. It is said that the consideration for the transfer of the bills of exchange to the plaintiffs was the compromise of criminal proceedings, and that they were not the lawful indorsees of them. Upon the facts of the case there is no foundation for this argument; there was no agreement to stifle a prosecution for felony. The evidence fails to disclose even a vestige of an agreement of that kind; the form and the subject of the transaction was different. The plaintiffs used threats to Maynard, but they did not come to an agreement with him not to prosecute him. A creditor may use strong expressions and even threats; and it was held in Ward *v.* Lloyd, 7 Scott, N. R. 499, that strong language is not conclusive evidence of an agreement to compound a felony or to stifle a prosecution. Both the facts and the law fail to support the case for the defendant. In Keir *v.* Leeman, 9 Q. B. 371, it was held by the Court of Exchequer Chamber, upon error from the Court of Queen's Bench, that the compromise of a prosecution for an assault, coupled with riot and the obstruction of a public officer, was illegal; but Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, said (9 Q. B. 395): "We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." I think that upon the authorities there can be no question that the plaintiffs had a right to take security for the debt due from May-

[1] Brett, L. J., and Cotton, L. J., delivered concurring opinions.

nard; it is open to any creditor to obtain payment of a debt justly due to him. We have referred to Williams v. Bailey, L. R. 1 H. L. 200; as that was a decision of the House of Lords, we should of course submit to it; but the principle of law there laid down is not applicable to the present case; for the plaintiff in the suit in the Court of Chancery sought to enforce the delivery of certain securities obtained from him without consideration. It is plain that there was no consideration for the plaintiff in that suit rendering himself liable for the debts of his son. The state of facts was different. I do not understand that any alteration of the law was caused by the decision in that case. I do not understand that the opinions of the Law Lords interfered with the general principles as to the right of a creditor to secure payment of his debt. A creditor has a perfect right to recover his debt by action; and upon this ground I think that the judgment of Denman, J., must be affirmed. The view taken by the learned judge, both as to the law and as to the facts, was correct.[1]

WILLIAM B. NICKELSON *v.* GEORGE A. WILSON

New York Court of Appeals, February 24—April 13, 1875

[*Reported in* 60 *New York*, 362]

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court at Special Term. (Reported below, 1 Hun, 615; 4 N. Y. S. C. [T. & C.] 104.)

This action was brought for the specific performance of a contract, and to restrain defendants from enforcing a judgment against plaintiff in alleged violation of said contract.

The court found substantially the following facts:—

On the 25th day of May, 1869, plaintiff sold a certain patent-right to the defendant Wilson and one J. Goodrich Scott, for $12,000, each agreeing to pay one half. Wilson gave his promissory notes, to the amount of $6,000, of which sum the plaintiff had $3,000, and Scott $3,000. After such sale, Wilson, claiming a fraud had been practised on him by the plaintiff and Scott, and that said notes had been obtained of him by means of false pretenses, commenced an action in the Supreme Court against them, to recover the amount of the notes, alleging they had been transferred to *bonâ fide* purchasers. Wilson also made a complaint before a grand jury, against the plaintiff and Scott for such alleged false pretences, and they were indicted therefor. Scott subsequently caused a petition in

[1] McClatchie *v.* Haslam, 65 L. T. 691; Paige *v.* Hieronymus, 192 Ill. 546; Powell *v.* Flannery, 109 Ky. 342; Thorn *v.* Pinkham, 84 Me. 101; Beath *v.* Chapoton, 115 Mich. 596; Cass County Bank *v.* Brickner, 34 Neb. 516; Barrett *v.* Weber, 125 N. Y. 18; Portner *v.* Kirschner, 169 Pa. 472; Board *v.* Angel, 75 W. Va. 747, *acc.*

bankruptcy to be filed to have Wilson adjudged a bankrupt; and evidence was taken before one of the registers in bankruptcy to sustain the petition. Plaintiff and Wilson authorized their counsel to do any act; or peform any act, make any agreement to further the interests of their clients in said litigations, and defence of the suit and proceedings. Wilson's counsel was the district attorney. Said counsel entered into an agreement substantially set forth in a memorandum made at the time as follows:—

"February 14, 1870.

"1. Nickelson will testify to all he knows in bankrupt case, in civil case, and in the criminal case.

"2. If there be no recovery against Scott in the civil action, there shall be none against N.

"3. The civil case going to judgment against S. and N., the judgment shall not be enforced against N. for more than $1,000, and this $1,000 may be paid in one of Wilson's notes for that sum.

"4. Nickelson shall be given the control for his benefit of judgment against Scott for whatever sum he has to account for to Wilson.

"5. Nickelson testifying fully as above, the counsel will recommend *nol. pros.* against Nickelson."

The clients were not informed of the full details of said agreement, but plaintiff followed the direction of his counsel, and in pursuance of such agreement waived his personal privilege, and testified as a witness on behalf of Wilson in the civil case, and in the bankruptcy proceedings, and also on the trial of said indictment, having been called by the district attorney. In the action for damages, Wilson recovered a judgment against Scott and Nickelson for the amount of the notes upon which plaintiff paid $1,000, but Wilson and the defendant Baker, his assignee in bankruptcy, refused to release planitiff from the judgment, or to transfer an interest therein.

The court further found "that the object and intent of the agreement was to stifle, embarrass, and to procure a discontinuance of the criminal proceedings pending against Nickelson at the time the agreement was entered into by the counsel as aforesaid." And, as conclusion of law, "that the agreement was against public policy, and void."

C. D. Adams, for the appellant.

Watson M. Rogers, for the respondents.

Rapallo, J. The court, at Special Term, found that the object and intent of the agreement which the plaintiff seeks to enforce in this action was " to stifle, embarrass, and procure the discontinuance of the criminal proceedings pending against the plaintiff." On this ground it decided that the agreement was against public policy and void, and this decision was affirmed by the Supreme Court at General Term.

The only evidence upon which the evidence was based consists of the written agreement and the testimony of the plaintiff's counsel as to the negotiation of which that agreement was the result. The plaintiff claims that this evidence is wholly insufficient to sustain the finding, or, in other words, that the finding is unsupported by any evidence.

The feature of the written agreement relied upon on the part of the defendants, as establishing the illegal intent, is the fifth clause, which provides that, "Nickelson testifying fully as above, the counsel will recommend *nol. pros.* against Nickelson."

The preceding part of the agreement referred to provided that Nickelson should testify to all he knew in the bankrupt case, the civil case, and the criminal case. The performance of this agreement involved a waiver by Nickelson of his personal privilege of declining to answer questions, his answers to which might tend to criminate him; and this waiver constituted the consideration for the whole agreement. There was nothing in the written agreement engaging the prosecutor to forbear bringing the indictment to trial against both of the accused, to withhold or suppress any evidence against the plaintiff, nor to interfere with the course of justice in any way. So far as can be gathered from the written agreement the object of the prosecutor was to obtain evidence upon which one, at least, of the accused might be convicted. The disposition of the other was to be left to the discretion of the court, and to depend upon the frankness with which he should testify. The prosecutor, who knew the facts as well as the accused, was competent to determine whether or not the testimony of the plaintiff was full and true; and if so, he agreed to intercede with the court for his discharge. On this assurance the plaintiff consented to incur the hazard of a full disclosure. Nothing more can be spelled out of the written agreement. The inference that indirect means or any others than those expressed in the agreement were to be employed to procure the discharge of the plaintiff, or to stifle or embarrass the prosecution against him, seems to us unwarranted and illegitimate.

The testimony of Mr. Starbuck, who was counsel for the plaintiff and made the agreement in his behalf, adds no force to the defendant's position. His object, undoubtedly, was — and in this he only performed his duty to his client — to secure to him by fair and legal means and with the approval of the court, immunity from his offence, if he had committed one, in consideration of his making full disclosure. The testimony of Mr. Starbuck, giving to it all the effect claimed by the defendants, amounts to nothing more than that, as a condition for agreeing to advise his client to expose himself to the peril of waiving his privilege and testifying to matters by which he might criminate himself, he exacted the promise of his adversary that if, under the advice of him, Starbuck, Nickelson should thus waive his privilege and state the whole truth, the counsel of the

prosecutor would unite with him, Starbuck, in a recommendation to the court that a *nolle prosequi* be entered against Nickelson. It also appears from the testimony of Mr. Starbuck that the plaintiff was not even informed of the arrangement, but placed his case in the hands of Mr. Starbuck, agreeing to do whatever he should advise, without asking any questions; and that when he gave his evidence he did not even know of the agreement to recommend a *nolle prosequi.* The counsel for the prosecutor was also district attorney of the county.

It cannot justly be deduced from this statement tha any means were agreed to be employed to obtain the discharge of Nickelson other than by openly, and in accordance with the well known and established practice prevailing in courts of criminal jurisdiction, invoking the action of the court in favor of an accomplice or co-defendant in a criminal indictment, of whose testimony the government avails itself for the purpose of securing the conviction of his confederate in the same crime.

The promised interposition in behalf of the plaintiff was upon the conditions that he should testify to all he knew. The arrangement had not in view the suppression of any evidence, but rather the eliciting of the truth; and the recommendation which the prosecutor agreed to give if the plaintiff should testify fully was simply that the course which was usual in such cases should be pursued. The plaintiff could not be called as a witness on the trial of the indictment except with the assent of the district attorney, and it was even then discretionary with the court whether or not to admit him to testify. If he appeared to be the principal offender he would be rejected. If the court admitted him, and he testified fully and candidly, there was an implied promise of immunity on the part of the government. People *v.* Whipple, 9 Cow. 713, 716. Where the State desires to call as a witness one of the several defendants, jointly indicted and tried, this can be done only by discharging the witness from the record, as by the entry of a *nolle prosequi,* etc. 1 Greenl. Ev. § 363. If an accomplice be admitted to testify, and appears to have acted in good faith in giving testimony, the government is bound in honor to discharge him. U. S. *v.* Lee, 4 McLean, 103. The English practice under such circumstances is, when the witness makes a clean breast, to grant a pardon. The admission of accomplices as witnesses for the government is justified by the necessity of the case, it being often impossible to bring the principal to justice without them. 1 Greenl. Ev. § 411. It is difficult to see how an arrangement for obtaining evidence of this description, on the usual terms, and subject to the control of the public prosecutor and of the court, can be violative of any rule of public policy. In my judgment, public policy requires that good faith be observed with persons charged with crime, who are induced to testify under such circumstances.

The cases relied upon on the part of the defence are of a totally different character; they are cases of agreements between the criminal and the prosecutor, whereby, in consideration of some compensation or reward given by the criminal, the prosecutor agrees to forbear the prosecution, or to suppress or destroy evidence which might lead to a conviction. The statutes against compounding felonies and misdemeanors point out very distinctly the character of that offence. 2 R. S. 689, §§ 17, 18; 692, § 12. They prohibit the taking of any money, property, gratuity, or reward, or any engagement or promise therefor, upon any agreement or understanding to compound or conceal a crime, abstain from prosecuting, or withhold evidence. These are the acts by which the course of justice may be interfered with and prosecutions may be stifled or embarrassed. And in all the cases which have been cited some of these vicious elements existed and appeared. In the often cited case of Collins *v.* Blantern, 2 Wilson, 343, 349, a promissory note was given by a friend of the accused in consideration of the agreement of the prosecutor not to appear and give evidence on a charge of perjury, and a bond of indemnity against the note was held void. In the Steuben County Bank *v.* Mathewson, 5 Hill, 249, 251, the bond sued upon had been given upon an agreement that the bank should surrender up a note alleged to be forged, and should not make a criminal charge for forging the note or obtaining the money thereon. In Porter v. Havens, 37 Barb. 343, the notes in suit were executed by one Havens, against whom criminal proceedings were pending, and were placed in the hands of a third party to be delivered to Barron, the payee, when the criminal proceedings against Havens should be "discontinued and ended"; and upon the further condition that Barron, the payee, should not arrest Havens or cause him to be arrested on any process whatever, but should cease all proceedings against him. The plain intent of this agreement was to supress the criminal prosecutions. In Conderman *v.* Hicks, 3 Lans. 108, the note was given to obtain the release of the maker, and the termination of criminal proceedings for false pretences, pending against him, but without the approval of the court or magistrate, as provided in 2 Revised Statutes, page 730, section 66, etc.

But the present case exhibits no such elements; the agreement looked not to an abandonment of the prosecution, but to bringing the indictment to trial; not to withholding of evidence, but to the procuring it; not to any secret effort to shield the plaintiff, but to an open application to receive him as State's evidence, with the consequences which usually follow.

A further ground for sustaining the validity of the agreement is to be found in the provisions of the Revised Statutes which permit the compounding, by leave of the court, of misdemeanors for which the injured party has a remedy by civil action. 2 R. S. 730, §§ 66, 67, 68. These provisions permit the court before whom the

indictment is pending to exercise, in its discretion, the power of ordering a perpetual stay of the prosecution, on the injured party appearing and acknowledging satisfaction, and on the payment of costs. In the present case the charge was false pretences, by which the prosecutor had sustained pecuniary damages. This offence has been held to amount, not to a felony, but merely to a misdemeanor (Fassett *v.* Smith, 23 N. Y., 252), and therefore falls within the provisions of the statute. The prosecutor might, therefore, lawfully have agreed to appear before the court and invoke its action under the statute referred to. That course was not pursued, and therefore the statute cited has not, perhaps, a direct bearing upon this case, but it affords some indication of the policy of the law upon the subject under consideration.

The whole point of the case lies in this: An agreement to cripple, stifle, or embarrass a prosecution for a criminal offence, by destroying or withholding evidence, suppressing facts, or other acts of that character, is against public policy, and void. In such cases the parties take the responsibility of interfering with, and by secret or indirect means, frustrating the administration of justice. But an agreement to lay the whole facts before the court, and to leave it to the free exercise of the discretionary powers vested in it by law, is not in itself wrong, and it is not rendered illegal even by a stipulation on the part of the prosecutor to exert such legitimate influence as his position gives him in favor of the extension of mercy to a guilty party.

Some other points have been suggested on the part of the defence which merit observation. The argument that the plaintiff's agreement to testify was not a sufficient consideration for the defendant's engagement has been already met. The plaintiff was privileged against criminating himself, and the waiver of this privilege constituted a consideration.

But it is further urged that any agreement to give testimony in consideration of a reward is against public policy, having a tendency to induce the commission of the crime of perjury; and in a well considered case (Pollak *v.* Gregory, 9 Bosw. 116) it was held that an agreement to pay a witness for testifying, on condition that his evidence should lead to a result favorable to the party calling him, was illegal and void. But the evil of such an agreement consists in the condition, which holds out to the witness the temptation of falsifying his testimony, so as to produce the result upon which his compensation is to depend. Where the witness simply consents to make a disclosure of the truth, and, as in the present case, he has no inducement to produce any special result, the mischief is not apparent. In Yeatman *v.* Dempsey, 7 C. B. [N. S.] 628, an agreement to testify, divested of such a condition, was sustained; and also in Webb *v.* Page, 1 C. & K. 23, in the case of an expert.

The defendant deemed the testimony of the plaintiff essential

to enable him to recover the judgment in question. It is conceded and found that the plaintiff performed his part of the agreement; and it is fairly presumable that the judgment was obtained by means of his testimony. It would be exceedingly unjust to enforce that judgment against him under the circumstances.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CHURCH, Ch. J., ALLEN, and FOLGER, JJ., concur.

GROVER, ANDREWS, and MILLER, JJ., dissent.

Judgment reversed.[1]

(*c*) AGREEMENTS TO SUBMIT TO A SPECIFIED TRIBUNAL

ALEXANDER SCOTT *v.* GEORGE AVERY

IN THE HOUSE OF LORDS, June 25, July 9, 1855, May 19, July 10, 1856

[*Reported in* 5 *House of Lords Cases,* 811]

ACTION on three policies of insurance effected on the ship "Alexander," valued at £2400, in three assurance companies, of which both the plaintiff and the defendant were members. It will be sufficient to refer to the first only. The declaration, after stating in the usual form the making of the policy, alleged that it was mutually agreed that all rules and regulations of the association should be binding on the assurers and assured, as if they were inserted in the policy and formed part thereof, and that the said rules and regulations, so far as they relate to the plaintiff's claim, are as follows: "That any member who shall prove to the committee of the said association that his ship is lost, will be entitled (at the expiration of two months from the date of the first quarterly settlement) to part payment for the same, but in no case to exceed 80 per cent on the sum insured, until a final account of the proceeds of the sale of the materials is furnished to the underwriters. That the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society." The declaration then alleged that the plaintiff "has performed all the conditions and things on his part by the said contract, policy, rules, and regulations to be performed; but that although he has always been ready and willing that such loss should be ascertained and settled by the said committee

[1] Rogers *v.* Hill, 22 R. I. 496, *acc.*

according to the rules of the said association of which the defendant had notice; and although the plaintiff has requested the defendant and the said committee so to ascertain the said loss, and although a reasonable time for them so to do elapsed before the commencement of this suit, yet the said committee has refused and neglected so to do; and although two months have expired since the date of the first quarterly settlement of the said association which occurred next after the said committee had notice of the said loss; and although a final account of the proceeds of the sale of the materials of the said ship was furnished to the underwriters of the said policy, in accordance with the said rules, long before the commencement of this suit; and although a reasonable time for the defendant and the said committee to pay the said loss elapsed before the commencement of this suit, yet neither the defendant nor the said committee had paid such loss, or any part thereof."

The defendant pleaded several pleas, but the only pleas material to the case of this policy are the fifth and sixth.

The fifth plea stated that one of the rules and regulations of the Newcastle A 1 Insurance Association is as follows: "25. That the sum to be paid by this association to any suffering member, for any loss or damage, shall in the first instance be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society. And if a difference shall arise between the committee and any suffering member, relative to the settling any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another. And if the committee refuse for fourteen days to make such selection, the suffering member shall select two, and in either case the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute, according to the rules and customs of the club, to be proved on oath by the secretary." "And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the statement begun *de novo*. Provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association), that no member who refuses to accept the amount of any loss as settled by the committee hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining the decision of

such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit."

The plea then stated that "the said committee, in pursuance of the said rule, proceeded to ascertain and settle the said loss, but before they had ascertained or settled it a difference and dispute arose, which has ever since existed between the said committee and the said plaintiff, relating to the said insurance, to wit, as to the extent of the said loss, and as to the repairs done to the said ship, and as to the sum to be paid by the said association to the plaintiff in respect of such loss; by reason and means and in consequence of which difference and dispute the said loss never has been ascertained or settled by the said committee." Averment of readiness and willingness by the committee to refer, and the refusal of the plaintiff so to do; "and the matters of the said difference and dispute have not nor has any of them been referred to arbitrators or decided, nor has the said loss be ascertained or settled by arbitrators, as by the said rule is in such case required."

The sixth plea stated "that the said committee did not refuse or neglect to ascertain the said loss as alleged, but, on the contrary, the defendant says that the committee did within a reasonable time in that behalf, and before the commencement of this action, ascertain and settle the sum to be paid by the said association to the plaintiff for the said loss, as the plaintiff well knew; but the plaintiff was dissatisfied with the settlement so made by the said committee, and declined to accept the sum at which they so ascertained and settled the said loss; and thereupon a difference and dispute arose, which has ever since existed between the said committee and the said plaintiff, relating to the said insurance, to wit, as to the extent of the said loss, and as to the sum to be paid by the said association to the plaintiff in respect of such loss." The plea then alleged that the rule set out in the fifth plea was binding on the plaintiff and defendant, and stated, as before, that the defendant and the committee were willing to refer, but this the plaintiff refused, etc.

Demurrer and joinder. Upon the argument of the demurrers at the sittings after Hilary Term, 1853, the Court of Exchequer gave judgment for the plaintiff in error.

On error brought the Court of Exchequer Chamber reversed that judgment, and gave judgment for the defendant in error. This writ of error was thereupon brought.

The judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Cresswell, Mr. Justice Wightman, Mr. Justice Earle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, and Mr. Justice Crowder attended.

Mr. *Atherton* and Mr. *C. E. Pollock* for the plaintiff in error.

Mr. *Bramwell* and Mr. *Manisty*, for the defendant in error.

The following question was put to the judges: "Whether, looking at the record in this case the judgment ought to be given for the plaintiff in error or for the defendant in error."

The Lord Chancellor, after stating the nature of the action and the pleadings, said: This question appears to me to be one merely of construction of the policy. For there is no doubt of the general principle which was argued at your Lordship's bar, that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need to refer to was a case decided about a century ago,— Kill *v.* Hollister, 1 Wils. p. 129. That was an action on a policy of insurance, in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided that there an action would lie, although there had been no reference to arbitration.

Then after a lapse of about half a century, occurred a case before Lord Kenyon, and from the language that fell from that learned judge, many other cases had probably been decided which are not reported; but in the time of Lord Kenyon occurred the case which is considered the leading case upon this subject, the case of Thompson *v.* Charnock, 8 T. R. 139. This was an action upon a charter-party, in which there was a stipulation that if any difference should arise it should be referred to arbitration. That clause was pleaded in bar to the action which has been brought upon a breach of the covenant, with an averment that the defendant has been and always was ready to refer the matter to arbitration. That was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts.

Just about the same time occurred a case in the Court of Common Pleas, when that court was presided over by Lord Eldon, the case of Tatterstall v. Groote, 2 B. and P. 131. That was an action by the administratrix of a deceased partner against a surviving partnership. To that action there was a demurrer, and the demurrer was allowed. But that case, I think, can afford very little authority in the present action, or in actions similar to the present, because there the covenant was only that if any dispute arose between the partners, they would name an arbitrator. One of the partners died and his administratrix brought an action, and Lord Eldon pointed out that the covenant did not apply to a case where one of the partners was dead, and an action was brought by one of his representatives. Therefore, in truth, that amounts to no decision whatever upon the general question.

There was then a case before Sir Lloyd Kenyon at the Rolls, of Halfhide *v.* Fenning, 2 Brown, C. C. 336, in which he held a different doctrine. That was a bill for an account of partnership transactions. The plea to that bill was, that the articles contained an agreement that any difference that should arise should be settled by arbitration; and

the Master of the Rolls allowed that plea. But I think that case cannot be relied upon, because it has been universally treated as having proceeded upon an erroneous principle. There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect of that right of action. Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle or policies of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. It appears to me that in such cases as that, the policy of the law is left untouched.

And that, I take it, is what was alluded to by Lord Hardwicke, in the case of Wellington *v.* Mackintosh, 2 Atk. 569, which was this: The articles of partnership in that case contained a covenant that any dispute should be referred. A bill was filed by one of the partners, and a plea set up that covenant to refer as a bar to the bill. Lord Hardwicke overruled the plea, but said that the parties might have so framed the deed as to oust the jurisdiction of the court. I take it that what Lord Hardwicke meant was, that the parties might have so framed the stipulations amongst themselves that no right of action or right of suit should arise until a reference had been previously made to arbitration. I think it may be illustrated thus: If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the mediums of the ordinary tribunals. But if I covenant with A. B. that if I do or omit to do a certain act then I will pay him such a sum as J. S. shall award as the amount of damages sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded my covenant has not been broken, and no right of action has arisen. The policy of the law does not prevent parties from so contracting. And the question is here, what is the contract? Does any right of action exist until the amount of damage has been ascertained in the specified mode? I think clearly not. The stipulation here is, that the sum to be paid to the suffering member shall be settled by the committee. Certain proceedings are provided to obtain the decision of the arbitrators, and there is this express stipulation, that "the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit."

That the meaning of the parties therefore was, that the sum to be

recovered should be only such a sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and that the sum so ascertained by arbitration, and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy. And if that was their meaning, the circumstance that they have not stated that meaning in the clearest terms or in the most artistic form, is a matter utterly unimportant. What the court below had to do was to ascertain what the meaning of the parties was as deduced from the language they have used. It appears to me perfectly clear that the language used indicates this to have been their intention: that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say.

It was argued that here the arbitrators were to decide, not the mere amount, but other matters, as, for instance, what average was to be allowed, whether there had been a loss, and a variety of other matters which were to be ingeniously suggested at your Lordships' bar. In the first place, if that had been so, it would not necessarily change my view of the case. I am not at all clear that it is not so. I observe the learned judges differed about that. I do not think it necessary to go into that, because I am quite prepared to say that, in my view of the case, that makes no difference at all. If, in consideration of a sum of money paid to me by A. B., I agree with him that in case J. S. should decide that A. B. had fulfilled certain conditions, and had sustained certain damage, and J. S. should make his award accordingly, I would pay to A. B. the sum so ascertained and awarded, no right of action would exist until J. S. had made his award.

I do not go into the question, therefore, whether in this case, according to the true construction of the contract, the amount of damage alone is to be ascertained, because in my view of the case, the principle goes much further. It appears to me perfectly clear that until the award was made, no right of action accrued, and consequently the judgment of the court below, reversing the judgment of the Court of Exchequer, and allowing the plea, was a perfectly correct judgment.

Your Lordships have had the benefit of the attendance of the learned judges on the argument in this case. They have differed in their opinion on it; there was a majority, but a bare majority, in favor of the view which I have taken of this case. Whichever way the preponderance of opinion among the learned judges may be, and however great it may be either way, of course the ultimate decision

rests with your Lordships; but it is always satisfactory to know that the view taken by your Lordships is in concurrence with the opinion of the learned judges. Here it is in concurrence with the opinion of the majority, though but a slender majority. However, I entirely agree with the majority; and I therefore humbly move your Lordships that the judgment below be affirmed, and that judgment be given for the defendant in error, with costs.[1]

[1] Justices COLERIDGE, CRESSWELL, WIGHTMAN, and CROWDER, in answer to the inquiry of the Lords, delivered opinions in favor of the defendant in error. Justice CROMPTON and Barons ALDERSON and MARTIN delivered contrary opinions. LORD CAMPBELL delivered an opinion concurring with the LORD CHANCELLOR.

In Viney *v.* Bignold, 20 Q. B. D. 172, WILLS, J., said: "The principle on which cases such as the present ought to be decided is very clear, and it is this. The court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant; but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover." Elliott *v.* Royal Ex. Ass., L. R. 2 Ex. 237; Dawson *v.* Fitzgerald, 1 Ex. D. 257; Collins *v.* Locke, 4 A. C. 674; Babbage *v.* Coulburn, 9 Q. B. D. 235; Caledonian Ins. Co. *v.* Gilmour, [1893] A. C. 85; Trainor *v.* Phœnix Fire Ass. Co., 65 L. T. 825; Manchester Ship Canal Co. *v.* Pearson, [1900] 2 Q. B. 606; Spurrier *v.* La Cloche, [1902] A. C. 446, *acc.* Compare Edwards *v.* Aberayron Ins. Soc. 1 Q. B. D. 563.

A test apparently intended to be similar to that adopted by the English Courts was adopted in the following cases: Hamilton *v.* Home Ins. Co., 137 U. S. 370; Crossley *v.* Conn. Ins. Co., 27 Fed. Rep. 30; Kahnweiler *v.* Phœnix Ins. Co., 57 Fed. Rep. 562; 67 Fed. Rep. 486; Connecticut Ins. Co. *v.* Hamilton, 59 Fed. Rep. 258; Mutual Ins. Co. *v.* Alvord, 61 Fed. Rep. 755; Old Saucelito Co. *v.* Commercial Ass. Co., 66 Cal. 253; Adams *v.* South British Ins. Co. 70 Cal. 198; Davisson *v.* Land Co., 153 Cal. 81; Ins. Co., 72 Cal. 297; Denver, &c. R. R. Co. *v.* Riley, 7 Col. 494; Denver, &c. Co. *v.* Stout, 8 Col. 61; Union Pacific Co. *v.* Anderson, 11 Col. 293; Hanover Fire Ins. Co. *v.* Lewis, 28 Fla. 209; Liverpool Ins. Co. *v.* Creighton, 51 Ga. 95; Southern Ins. Co. *v.* Turnley, 100 Ga. 296; Birmingham Ins. Co. *v.* Pulver, 126 Ill. 329, 338; Lesure Lumber Co. *v.* Mutual Fire Ins. Co., 101 Iowa, 514; Zelesky *v.* Home Ins. Co., 102 Iowa, 613; Read *v.* State Ins. Co., 103 Iowa, 307; Dee *v.* Key City Ins. Co., 104 Iowa, 167; Fisher *v.* Merchants' Ins. Co., 95 Me. 486; Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116; Guthat *v.* Gow, 95 Mich. 527; Boots *v.* Steinberg, 100 Mich. 134; Weggner *v.* Greenstine, 114 Mich, 310; Gasser *v.* Sun Fire Office, 42 Minn. 315; Levine *v.* Lancashire Ins. Co, 66 Minn. 138; Mecartney *v.* Guardian Trust Co., 274 Mo. 224; Delaware & H. C. Co. *v.* Penn. Coal Co., 50 N. Y. 250; Anderson *v.* Hall, 86 N. J. L. 271; National Co. *v.* Hudson River Co., 170 N. Y. 439; Keefe *v.* National Soc., 4 N. Y. App. Div. 392; Spink *v.* Co-operative Ins. Co., 25 N. Y. App. Div. 484; Van Note *v.* Cook, 55 N. Y. App. Div. 55; Pioneer Mfg. Co., *v.* Phœnix Ass. Co., 106 N. C. 28 (see, however, Pioneer Mfg. *v.* Phœnix Ass. Co., 110 N. C. 176; Uhrig *v.* Williamsburg Ins. Co., 116 N. C. 491); Monongahela Nav, Co. *v.* Felon, 4 W. & S. 205; Reynolds *v.* Caldwell, 51 Pa. 298; Gowen *v.* Pierson. 166 Pa. 258; Chandley *v.* Cambridge Springs, 200 Pa. 230, 232; Scottish Ins. Co. *v.* Clancy, 71 Tex. 5; American Ins. Co. *v.* Bass Bros., 90 Tex. 380, 382; Van Horne *v.* Watrous, 10 Wash. 525; Zindorf Co. *v.* Western Co., 27 Wash. 31 (*conf.* Winsor *v.* German Soc., 72 Pac. Rep. 66); Chapman *v.* Rockford Ins. Co., 89 Wis. 572. See also Randall *v.* Phœnix Ins. Co., 10 Mont. 362; Kahn *v.* Traders' Ins. Co., 4 Wyo. 419. In many of these cases, however, the court considered not only the question whether the provision for arbitration was expressed as a condition precedent or as a collateral promise, but also the question whether the agreement for arbitration related to the liability under the contract or to the amount of damages.

WILLIAM LIVINGSTONE *v.* ANTONIO RALLI

IN THE QUEEN'S BENCH, TRINITY TERM, 1885

[*Reported in* 5 *Ellis & Blackburn,* 132]

COUNT that, by a contract, plaintiff agreed to buy of defendant, and defendant to sell to plaintiff, a cargo of wheat, on certain terms mentioned in the contract, "and that, should any difference arise as to that contract, the same should be left to arbitration in London, in the usual manner; that is to say, the arbitration of two London corn factors, one to be chosen by plaintiff and the other by defendant, or an umpire to be chosen by such arbitrators in case of difference." Averment that the cargo of wheat arrived, and was accepted, and the price paid, by plaintiff to defendant, according to the agreement, and that a difference thereupon and before this suit arose between plaintiff and defendant as to the said contract, which difference ought to have been left to arbitration in manner so agreed as aforesaid. General averment of performance by plaintiff and of lapse of reasonable time for appointing an arbitrator. Breach: that defendant refused to concur with plaintiff in referring the said difference, or procuring it to be disposed of by arbitration in the said usual manner, and wrongfully hindered and prevented it being so left or disposed of.

Plea, setting out the contract in *hæc verba* as follows: "London 21st January, 1854. Sold by order and on account of Messrs. A. Ralli & Co., to our principals the cargo of Taganrog Ghirka Wheat shipped at Taganrog on board the Mary and Ellen, and consisting of 2630 chetwerts of 10 poods, as per bill of lading dated the 12 November, at the price of 75*s.* say 75 shillings per quarter, free on board there, including freight and insurance (the latter free from war risk), to a safe port in the United Kingdom, calling for orders. Reckoning 72 quarters for every 108 chetwerts of 10 poods shipped. No charge to be made for demurrage. The sale subject to the arrival of the wheat in good order and condition at port of call; a slight dry warmth, so long as the wheat is not injured for the miller's use, is not to be objected to. Should the cargo not arrive in good order and condition, with the above exception, it is either to be accepted or rejected within 24 hours of the receipt of the report and samples by us for the buyer. The cargo to be examined at Queenstown by Messrs. James Scott & Company, and at Falmouth by Messrs. Lashbrook & Hunt. Should the cargo be accepted, the buyer is to take all the risk from port of shipment. Payment to be made in cash, less discount for the unexpired term of three months from date of bill of lading, on landing same, together with approved policies of insurance. Should the cargo be rejected, the money to be returned with the interest. Should any difference arise as to this contract, the same is to be left to arbitration in London in the usual manner." Averment: "That

the said supposed difference in the declaration mentioned was a difference concerning a claim and demand made by plaintiff upon defendant for compensation of damages alleged to be payable by defendant to the plaintiff for reason of the said cargo of the said wheat being deficient, as amounting to a less quantity than the quantities of 2630 chetwerts of 10 poods, as per bill of lading in the said agreement mentioned, and with no other difference whatsoever." Whereupon the defendant refused and declined to concur in referring the supposed difference to arbitration, as in the declaration is alleged.

Demurrer. Joinder.

Willes, in support of the demurrer.

Lord Campbell, C. J.[1] I have a very great respect for the doubts of Lord Eldon, and he seems in Tatterstall *v.* Groot,[2] to doubt much whether such a contract as the present was not altogether nugatory; but I cannot bring myself to doubt that, on principle, an action lies on it. There is a sufficient consideration to support any promise; and there is an express promise to refer to any disputes that may arise. Why should not such a promise be binding, and one for the breach of which an action would lie? Can it be said that such an agreement is void as being immoral, or as contrary to public policy? It seems to me, on the contrary, that it is a very judicious and proper arrangement, and that it would be a strange restriction on the liberty of the subject if parties could not make such an agreement if they please.

Then, as to the authorities. It certainly seems that, in Tatterstall *v.* Groote,[2] Lord Eldon expressed much doubt: but neither in that case nor in any other was there a decision that an action could not be maintained on such an agreement: and, ever since I have known Westminster Hall at least, the opinion of the profession has been that, though such a prospective agreement of reference could not bar an action in the courts of law, yet an action was maintainable for the breach of it. There seems at one time to have prevailed in our courts a horror of a domestic forum which I can neither sympathize with nor account for; but the Legislature has recently, in the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 11, made a provision in such cases, not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shows the opinion of the Legislature that such agreements are not contrary to public policy. For these reasons I have to entertain no doubt that the action lies.

Then it is shown that there is no real difference to refer? The count avers that there was. The plea admits that there was a difference, which it states, and which, it is contended, has been already decided. But I cannot say that this is not a fair subject of difference. I do not know what evidence may be brought before the arbi-

[1] Coleridge and Erle, JJ., delivered concurring opinions. Crompton, J., also concurred.

[2] 2 B. & P. 131.

trator, or how he may decide. I think if there was no real dispute that would be a bar: but that should be so pleaded that the plaintiff might take issue upon it; and then a jury would decide if there was a real difference or not.[1]

AUGUSTINE K. WHITE *v.* MIDDLESEX RAILROAD COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 7–June 21, 1883

[*Reported in* 135 *Massachusetts,* 216]

CONTRACT for money had and received, to recover $65, deposited by the plaintiff with the defendant corporation under a written agreement, providing, among other things, that the plaintiff, who was about to enter the defendant's employ as a conductor, should, upon entering such employ, deposit the sum of $65, to be retained by the defendant, together with interest accrued thereon and all wages that might be due him, as security for the proper discharge of his duties, for the due accounting for and paying over to the defendant of all fares received, and for the due observance by him of all the rules and regulations of the defendant; that, in case of a breach by the plaintiff of any of said rules and regulations, the defendant might retain the whole of said deposit and any interest thereon, and the amount of wages that might be due him, as liquidated damages, for such breach; and that the defendant's president "shall be the sole judge between the company and the conductor whether the company is entitled to retain the whole or any part of said $65 and interest, and all wages that may at any time be due him, as liquidated damages. And his certificate in writing that the same or any given part thereof, stated in such certificate, are to be so retained and forfeited to the company, and of the cause of such retention, shall be a final adjudication thereof, binding and conclusive evidence between the parties in all the courts of justice, civil and criminal, both that the amount thereby certified as the true amount to be forfeited and retained by the company, and that that has happened which in such certificate is certified to be the cause, and that it is a lawful and sufficient cause for such retention; and such certificate shall bar the conductor of all right, under any circumstances, to recover the moneys so certified to be forfeited and retained, or any part thereof."

The case was submitted to the Superior Court, and, after judgment

[1] Donegal *v.* Verner, 6 Ir. Rep. C. L. 504; Hamilton *v.* Home Ins. Co., 137 U. S. 370, 385; Hill *v.* More, 40 Me. 515, 523, *acc.* See also Nute *v.* Hamilton Mut. Ins. Co. 6 Gray, 174, 181; Union Ins. Co. *v.* Central Trust Co., 157 N. Y. 633; Gray *v.* Wilson 4 Watts, 39, 41. But only nominal damages are recoverable. Munson *v.* Straits of Dover S. S. Co., 99 Fed. Rep. 787, 102 Fed. Rep. (C. C. A.) 926; and specific performance will not be granted. 3 Williston, Contracts, § 1421.

for the plaintiff, to this court on appeal, upon agreed facts, in substance as follows:—

The defendant received said $65 under said agreement, and the only claim the defendant has to such money is by virtue of the agreement and president's certificate indorsed thereon, as follows: "By virtue of the written agreement, and under the power therein conferred upon me, I, Charles E. Powers, president of the said Middlesex Railroad Company, do hereby adjudge and decide that said railroad company is entitled to retain the whole of the $65 deposited with it under said agreement, together with all the interest thereon, and the same is hereby declared to be forfeited to the said railroad company on account of the breach by the within-named Augustine K. White, conductor, of the fourth clause of said agreement [which related to the faithful discharge of his duty as a conductor] and of the sixty-fifth and sixty-sixth rules and regulations of the Middlesex Railroad Company."

The rules and regulations above referred to were as follows: "65. The punch must be used to cancel and record a fare for each and every person over three years of age who rides upon the car. 66. As soon as fare has been received from one person the punch must be used in the presence of such person, to record such fare or fares, before another one is taken up. Failure to comply with this rule, in every instance will be positive cause of dismissal."

The plaintiff contends that this money should be paid to him for the reason that the agreement was, on its face, unconscionable and void, and against public policy.

The defendant contends that the agreement was valid, legal, and final between the parties.

If the court should be of the opinion that the agreement was void, judgment was entered for the plaintiff; if it was valid, judgment for the defendant.

L. M. Child, for the defendant.

J. F. Pickering and *J. W. Pickering* for the plaintiff.

Field, J. If the parties had an opportunity to appear and be heard before the president of the company, and the plaintiff had appeared and been heard, and an award had actually been made that nothing was due the plaintiff, this award would be a bar to the action, unless for some cause it was impeached. The fact that an arbitrator was an officer of the defendant corporation, as it was known to the plaintiff when he signed the agreement, would not invalidate the award. But it does not appear by the agreed statement of facts that any hearing was ever had before the president or that the company ever made any claim before him that the plaintiff had not fully performed his duties, or that the plaintiff ever had any notice that the company made any such claim, and that the president would proceed to hear the parties, and adjudicate upon the question whether the company had the right under the agreement to retain the whole or any part of the $65.

By the agreed facts it appears that the agreed contention between the parties is not upon an award, but upon the agreement, whether it is valid or void; and that, if the court is of the opinion that the agreement is void, judgment is to be entered for the plaintiff; if it is valid, judgment to be for the defendant. The principal contention in argument on the part of the company is, that this is not an agreement to arbitrate, but an agreement that the company may retain the whole of the $65, or such part as the president may adjudge, and that, until the president has adjudged that the whole or some part is due to the plaintiff, no action at law can be maintained by him.

London Tramways Co. *v.* Bailey, 3 Q. B. D. 217, is almost identical with the case at bar, and the judgment was for the company. See also Wilson *v.* Glasgow Tramway & Omnibus Co., 5 Sc. Ses. Cas. (4th ser.) 981, and Glasgow Tramway & Omnibus Co., *v.* Dempsay, 3 Coup. Just. 440. The decision in London Tramways Co. *v.* Bailey, *ubi supra,* was by Mellor and Lush, J. J., and is put upon the ground that the "agreement is very like the stipulation that the certificate of an architect or engineer shall be conclusive." It seems to be the doctrine of the English Courts that agreements prohibiting a party from bringing an action or purporting to oust the courts entirely of their jurisdiction, are void; that, in contracts in which it is a condition precedent to the right to maintain an action that there shall first be a reference and an award, no action can be maintained until this condition has been complied with, unless, indeed, it becomes impossible to comply with it; but if the stipulation to refer to arbitration is collateral to the other stipulations of the contract, an action can be maintained upon the contract without a reference. Babbage *v.* Coulburn, 9 Q. B. D. 235; Edwards v. Aberayon Ship Ins. Society, 1 Q. B. D. 563; Dawson *v.* Fitzgerald, 1 Ex. D. 257; Hope *v.* International Financial Society, 4 Ch. D. 327; Scott *v.* Liverpool, 3 De G. & J. 334; Horton v. Sayer, 4 H. & N. 643.

Scott v. Avery, 5 H. L. Cas. 811, left it uncertain whether, if in a contract the agreement to submit to arbitration is a condition precedent to maintain the action, and includes all disputes that may arise under the contract, and is not confined to questions which affect the amount of damages, it is, or is not, void. The cases we have cited show that English judges do not yet agree in opinion on this question. The inclination of this court has been to regard such an agreement as void. Cobb *v.* New England Ins. Co., 6 Grey, 192; Rowe *v.* Williams, 97 Mass. 163; Wood *v.* Humphrey, 114 Mass. 185; Pearl *v.* Harris, 121 Mass. 390; Vass *v.* Wales. 38. See also Trott *v.* City Ins. Co., 1 Cliff. 439; Mansfield *v.* Doolin, I. R. 4 C. L. 17.[1]

[1] Dickson Mfg. Co. *v.* American Locomotive Co., 119 Fed. Rep. 488; Meaher *v.* Cox, 37 Ala. 201; Western Ass. Co. *v.* Hall, 112 Ala. 318; Bauer *v.* Samson Lodge. 102 Ind. 262; Supreme Council *v.* Garrigus, 104 Ind. 133; Louisville, &c. Ry. Co. *v.* Donnegan, 111 Ind. 179; Supreme Council *v.* Forsinger, 125 Ind. 52; McCoy *v.* Able, 131 Ind. 417; Ison *v.* Wright, 55 S. W. Rep. (Ky.) 202; Robinson *v.* Georges Ins. Co., 17 Me. 131; Stephenson *v.* Piscataqua Ins. Co., 56 Me. 419; (but see Fisher *v.*

If such an agreement in a contract is not void as contrary to the policy of the law, the whole doctrine amounts to this, that courts will not specifically enforce the agreement, but will treat it as valid, and as a condition precedent, or as an independent stipulation, according to the construction given to the contract.

The agreement in this case seems to us an attempt to oust courts entirely of jurisdiction over the question whether the defendant is entitled to retain the whole, or some part, of the $65, as liquidated damages for breach of the contract. It regards this sum, or such part of it as the president may determine, as forfeited by the plaintiff, if the president shall so certify.

In Hope *v.* International Financial Society, *ubi supra,* the defendant contended that the plaintiff had no standing in court, because he had forfeited his shares under the articles of association by taking legal proceedings against the company; but Lord Justice James said: "We cannot listen to that argument. Any stipulation that a shareholder shall not appeal to a court of justice must be bad." 4 Ch. D. 334.

In London Tramways Co. *v.* Bailey, *ubi supra,* no cases were cited by the court, and only Brown *v.* Overbury, 11 Exch. 715, and Scott *v.* Avery, *ubi supra,* were cited by the counsel. Brown *v.* Overbury was an action to recover the stakes at a steeple chase, when the stewards, who, by the articles, were to decide the race, had met, and were unable to decide whose horse had won; and it was held that it was a condition precedent to the plaintiff's right to recover that he obtain the judgment of the stewards, if practicable. Baron Alderson said: "Every contract must be determined acording to the circumstances belonging to it. This is one of racing, and the universal practice has been that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of the jury but of the persons appointed to decide it, viz., the judges or the stewards. The courts do not decide what the effect would be if it became possible to obtain a decision from the stewards. There is, we think, notwithstanding what was said by Lord Campbell in Scott *v.* Avery, *ubi supra,* little analogy between that case and the case at bar. Neither do we think that this agreement is like a building contract, in which the decision and certificate of an architect or engineer,

Merchants' Ins. Co., 95 Me. 486); Phœnix Ins. Co. *v.* Zlotky, 92 N. W. Rep. (Neb.) 736; Hartford Ins. Co. *v.* Hon. 92 N. W. Rep. (Neb.) 742; Leach *v.* Republic Ins. Co., 58 N. H. 245; Baltimore, &c. R. R. Co. *v.* Stankard, 56 Ohio St. 224; Myers *v.* Jenkins, 63 Ohio St. 101; Ball *v.* Doud, 26 Oreg. 14; Gray *v.* Wilson, 4 Watts, 39; Commercial Union Ass. Co. *v.* Hocking, 115 Pa. 407; Yost *v.* Dwelling House Ins. Co. 179 Pa. 381; Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. 255; Needy *v.* German American Ins. Co., 197 Pa. 460; Pepin *v.* Société St. Jean Baptiste, 23 R. I. 81; Daniher *v.* Grand Lodge, 10 Utah, 110; Kenney *v.* Baltimore, &c. Association, 35 W. Va. 385 *(cmf.* Baer's Sons Co. *v.* Cutting Fruit Packing Co., 43 W. Va. 359), *acc.* See also Edwards *v.* Aberayron Ins. Co., 1 Q. B. D., 563, and the Michigan, Minnesota, and New York decisions cited in the note to Scott *v.* Avery, *ante;* also Greenhood on Public Policy, 467 *et seq.* and cases cited.

upon the quantity or quality of the work done, is a condition precedent to the plaintiff's maintaining his action for the price. Such a stipulation in a building contract is not regarded as strictly an agreement to submit to arbitration. Wardsworth *v.* Smith, L. R. 6 Q. B. 332; Palmer v. Clark, 106 Mass. 373. No hearing of the parties is usually contemplated. The matters to be examined relate to things that are visible and can be determined by appraisal, inspection, measurement, or other similar methods, and pertain solely to the performance of the work to recover the price of which the plaintiff brings his action, and it is an irrevocable part of such contracts that the plaintiff shall recover only upon the condition that the architect or engineer certifies that the work has been done according to the contract, or shall only recover for extra work whatever the architect or engineer estimates the value of it to be, or shall recover only if the work is done to the satisfaction of the architect or engineer.

This is not a suit for wages; and if it were, the plaintiff is not, by his agreement, required to perform his duties to the satisfaction of the president of the company, and there is no stipulation that the plaintiff shall recover as wages only such sum as the president may determine. This is a suit to recover a deposit. If the defendant claims the right to retain it, as liquidated damages, for a breach of the agreement by the plaintiff, the burden is on the defendant to prove the breach. If a controversy arises upon the questions whether there has been such a breach, and whether the company has the right to retain the deposit, as liquidated damages for such breach, there is a stipulation that the president shall be the sole judge of it, and that his certificate shall be the final adjudication of it. Such a stipulation is, we think, an agreement to submit to arbitration, and an attempt to oust courts of justice of all jurisdiction over the whole controversy, and is void.

In the opinion of a majority of the court, the

Judgment must be affirmed.[1]

JONAS M. MILES AND ANOTHER *v.* ARTHUR P. SCHMIDT

SUPREME JUDICIAL COURT OF MASSACHUSETTS, DECEMBER 3, 1896
MAY 20, 1897

[*Reported in* 168 *Massachusetts*, 339]

BILL in equity, to enforce the specific performance of a written contract.

The defendant demurred to the bill, assigning as ground therefor the following arbitration clause contained in the contract:

[1] Rozen *v.* Dry Dock, &c. R. R. Co., 27 N. Y. Supp. 337, *contra*. See, however, Pope Mfg. Co. *v.* Gormully, 144 U. S. 224; Fidelity Co. *v.* Eickhoff, 63 Minn. 170; Fidelity Co. *v.* Crays, 76 Minn. 450; Baltimore, &c. R. R. Co. *v.* Stankard, 56 Ohio St. 224. *Cf.* New England Trust Co. *v.* Abbott, 162 Mass. 148.

"It is further mutually agreed that in case of any alleged violation of the promises and agreements herein made by said Schmidt or by said firm, if such alleged violation is continued after thirty days' notice in writing from the other to the party charged as guilty of such violation, requiring such party to cease such violation, then the party so guilty shall be liable to the other for all damages caused by such violation, to be determined by a board of referees in manner as follows:

"After the expiration of the thirty days' notice provided for in the above clause, said Schmidt and said firm shall each forthwith appoint a referee, and the two so appointed shall appoint the third. If either party fails to appoint a referee for ten days, after written notice of such appointment by the other party, then the referee so appointed shall appoint a second, and the two so appointed shall appoint a third.

"The referee shall proceed forthwith to hear the parties and to determine whether or not there has been any violation of the agreements herein contained, and whether the same has continued for more than thirty days after notice to discontinue such violation above provided for, and what damage either party has sustained by reason of such violation.

"The decision of a majority of said referees shall be final and binding on said parties, and they hereby agree to abide by, submit to, and forthwith to comply with any decision, or award, of a majority of said referees. The expense of any such reference shall be borne by any or all the parties in such proportion as said referees may determine."

The Superior Court sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

C. B. Southard (*T. Parker with him*), for the plaintiff.

H. M. Rogers, for the defendant.

MORTON, J. Perhaps, if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of the jurisdiction in such cases. But the law is settled otherwise in this State. Rowe *v.* Williams, 97 Mass. 163; Wood *v.* Humphrey, 114 Mass. 185; Pearl *v.* Harris, 121 Mass. 390; Vass v. Wales, 129 Mass. 38; White v. Middlesex Railroad, 135 Mass. 216. When the question is a preliminary one, or in the aid of an action at law or suit in equity, such, for instance, as the ascertainment of damages, an agreement for arbitration will be upheld. Wood *v.* Humphrey, 114 Mass. 185; Reed *v.* Washington Ins. Co., 138 Mass. 572, 575; Hutchinson *v.* Liverpool & London & Globe Ins. Co., 153 Mass. 143. The defendant contends that the agreement for arbitration in this case goes no further than the assessment of damages. But it is expressly provided, among other things, that the referees shall "hear the parties and determine whether or not there has been any violation of the agreements herein contained. . . .

and what damage either party has sustained" thereby, and that, "the decision of a majority of said referees shall be final and binding on said parties." The evident intent is to submit all disputes relating to the performance of the agreement to the final decision of a tribunal constituted by the parties themselves. The referees are not only to assess the damages, but also to determine whether there have been any violations of the agreement, and their decision in all matters is to be final. The agreement to submit to arbitration was therefore in violation of the law, and the demurrer should have been overruled.

Demurrer overruled, and decree dismissing bill set aside.

UNITED STATES ASPHALT REFINING COMPANY *v.* TRINIDAD LAKE PETROLEUM COMPANY, LTD.

District Court for the South District of New York.
January 23, 1915

[*Reported in* 222 *Federal Reporter,* 1006]

Hough, District Judge. One of these actions is brought for the alleged breach of the charter party of the steamship Russian Prince, and the other for a similar breach of a like charter party relating to the steamship Roumanian Prince. Libelant is a corporation of South Dakota. Respondent was the chartered owner of the steamships above named. It is a British corporation and the vessels are of British registry.

The charter parties by which libelant took the steamers from respondent were made in London, and granted libelant the right to use the vessels in any lawful traffic in most parts of the world, As matter of fact the steamers were employed between Trinidad and the United States ports until the outbreak of war in August, 1914, when it is alleged that the vessels were wrongfully withdrawn from char-

[1] In Reed *v.* Washington Ins. Co., 138 Mass. 572, the action was brought upon an insurance policy in the form prescribed by the Massachusetts statute. The policy contained the following provision: "In case any difference of opinion shall arise as to the amount of loss under this policy, it is mutually agreed that the said loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen, provided that neither party shall be required to choose or accept any person who has served as a referee in any like case within four months; and the decision of a majority of said referees in writing shall be final and binding on the parties."

At the conclusion of the plaintiff's evidence, the judge declined to rule, as requested by the defendant, that the plaintiff could not recover without evidence of a reference to arbitration. This ruling was sustained by the full court on the ground that the clause was not expressed as a condition precedent. See also Clement *v.* British American Ass. Co., 141 Mass. 298.

In Lamson Store Service Co. *v.* Prudential Ins. Co., 171 Mass. 433, the action was brought upon a policy in the form prescribed by a later Massachusetts statute (St. 1887, c. 214, § 60). The policy contained a clause similar to that quoted above, except for the following added words, "and such reference, unless waived by the parties, *shall be a condition precedent to any right of action in law or equity to recover for such loss.*" The court held that the words constituted a condition precedent to the plaintiff's right of action.

terer's service. These actions *in personam* were begun with clause of foreign attachment, and appearance enforced by seizure of funds within this jurisdiction. Before any steps in the actions other than appearing and giving security for the seized property had been taken, these motions were made.

The charter party of each steamer contained the following very ordinary clause:

"19. Any dispute arising under this charter shall be settled in London by arbitration, the owners and charterers each appointing an arbitrator, and the two so chosen, if they do not agree, shall appoint an umpire, the decision of whom shall be final. Should either party refuse or neglect to appoint an arbitrator within 21 days of being required to do so by the other party, the arbitrator appointed may make a final decision alone, and this decision shall be binding upon both parties. For the purpose of enforcing any award, this agreement shall be made a rule of court."

There can be no doubt that this was submission to arbitration, and for that reason was a contract between the parties to this action; District of Columbia *v.* Bailey, 171 U. S. at page 171, 18 Sup Ct. 868, 43 L. Ed. 118; citing Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486. It is equally plain that under the law of the place of the contract—i.e. England—this arbitration agreement was at the time of making the charter parties entirely valid, and any endeavor to do exactly what libelant has done by bringing these suits would have been restrained by the English courts, acting under the authority of the English Arbitration Act of 1889 (chapter 49, 52-53 Victoria). See, also Manchester Ship Canal Co. *v.* Pierson & Son [1900] 2 Q. B. 606; Australian Lloyd Co. *v.* Gresham, etc., Society [1903] 1 K. B. 249.

The contentions of the parties litigant may therefore be summed up as follows: Respondent urges that the contract for arbitration contained in the charter parties was valid and enforceable when and where it was made, and must consequently be enforced everywhere, unless some positive rule of the law of the forum prevents such recognition and enforcement. Libelant asserts that, whether the contract was or was not good at the time and place of making it has always been invalid under the law of the United States and most of the states thereof, with the admitted and asserted result that an American may make a solemn contract of this nature in England and repudiate it at will in America with the approbation of the courts of his own country.

There has long been a great variety of available reasons for refusing to give effect to the agreements of men of mature age, and presumably sound judgment, when the intended effect of the agreements was to prevent proceedings in any or all courts and substitute therefor the decision of arbitrators. The remarkably simple nature of this libelant's contract has led me to consider at some length the nature and history of the reasons adduced to justify the sort of conduct, by no means new, but remarkably well illustrated by these libels.

It has never been denied that the hostility of the English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott *v.* Avery, 4 H. L. Cas. 811)—

"in the contests of the courts of ancient times for extension of jurisdiction — all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."

A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason:

"It is not necessary now to say how this point ought to have been determined if it were *res integra* — it having been decided again and again," etc. Per Kenyon, J., in Thompson *v.* Charnock, 8 T. R. 139.

There is little difference between Lord Kenyon's remark and the words of Cardozo, J., uttered within a few months in Meacham *v.* Jamestown, etc., R. R. Co., 211 N. Y. at page 354, 105 N. E. at page 656:

"It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary."

Nevertheless, the legal mind must assign some reason in order to decide anything with spiritual quiet, and the causes advanced for refusing to compel men to abide by their arbitration contracts may apparently be subdivided as follows:

(a) The contract is in its nature revocable.

(b) Such contracts are against public policy.

(c) The covenant to refer is but collateral to the main contract, and may be disregarded, leaving the contract keeper to his action for damages for breach of such collateral covenant.

(d) Any contract tending to wholly oust the courts of jurisdiction violates the spirit of the laws creating the courts, in that it is not competent for private persons either to increase or diminish the statutory juridical power.

(e) Arbitration may be a condition precedent to suit, and as such valid, if it does not prevent legal action, or seek to determine out of court the general question of liability.

The Doctrine of Revocability

This seems to rest on Vinior's case, 8 Coke, 81b, and is now somewhat old-fashioned, although it appears in Oregon, etc., Bank *v.* American, etc., Co. (C. C.) 35 Fed. 23, with due citations of authority: and in Tobey *v.* County of Bristol, 3 Story, 800, Fed. Cas. No. 14,065, it is treated at great length.

The Public Policy Doctrine

No reason for the simple statement that arbitration agreements are against public policy has ever been advanced, except that it must be against such policy to oust the courts of jurisdiction. This is hardly a variant of the reasoning ascribed by Lord Campbell to the "courts of ancient times":

"Such stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts." Hurst *v.* Litchfield, 39 N. Y. 377.

"Such agreements have repeatedly been held to be against public policy and void." Prince Co. *v.* Lehman (D. C.) 39 Fed. 704, 5 L. R. A. 464.

The above are two examples of the cruder forms of statement; but of late years the higher courts have been somewhat chary of the phrase "public policy" and Insurance Co. *v.* Morse, 20 Wall. 457, 22 L. Ed. 365, Hunt, J., quotes approvingly from Story's Commentaries, thus:

"Where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but will leave the parties to their own good pleasure in regard to such agreements."

But neither the court nor the commentator pointed out any other method by which an arbitration agreement could be against the policy of the law, unless it were by seeking to divest the "ordinary jurisdiction of the common tribunals of justice."

Having held up the doctrine that any contract which involves an "ouster of jurisdiction" is invalid, the Supreme Court of the United States has been able of late years to give decision without ever going behind that statement. Thus in Insurance Co. *v.* Morse, *supra,* it is said:

"Agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."

In Doyle *v.* Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148, the case cited last is distinctly reaffirmed. The lower courts have followed, and in Perkins *v.* United States, etc., Co. (C. C.) 16 Fed. 153, Wallace J., said:

"It is familiar doctrine that a simple agreement inserted in a contract, that the parties will refer any dispute arising thereunder to arbitration, will not oust courts of law of their ordinary jurisdiction."

Even a partial ouster was held "evidently invalid" when inserted in a bill of lading, in the Etona (D. C.) 64 Fed. 880, citing Slocum v. Western Assurance Co. (D. C.) 42 Fed. 236, and the Guildhall (D. C.) 58 Fed. 796.

The Doctrine That the Covenant to Refer is Collateral Only

This idea is set forth with his customary clearness by Jessel, M. R., in Dewson *v.* Fitzgerald, 1 Ex. D. 257. It is repeated in Perkins *v.* United States, etc., Co., *supra,* and accepted in Crossley *v.* Connecticut, etc., Co., (C. C.) 27 Fed. 30. The worthlessness of the theory was amply demonstrated in Munson *v.* Straits of Dover (D. C.) 99 Fed. 787, affirmed 102 Fed. 926, 43 C. C. A. 57, where Judge Brown, accepting without query or comment the doctrine that any agreement which completely ousted the courts of jurisdiction was specifically unenforceable, found himself unable to award more than nominal damages for the breach of the collateral agreement. The opinion for affirmance (102 Fed. 926, C. C. A. 57) is written by Wallace, J., who had himself pointed out in Perkins v. United States, etc., Co., *supra,* that the action for the breach of the collateral agreement to refer was a remedy against the contract breaker who sued when he had promised not to. Comment seems superfluous upon any theory of law (if law be justice) that can come to such conclusions.

The Theory That Arbitration Agreements Violate the Spirit of The Laws Creating the Courts

This is the accepted doctrine in New York, as shown in Meacham *v.* Jamestown etc., Railroad, *supra.* Yet it is surely a singular view of judicial sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the Court.

The Theory That a Limited Arbitration, Not Ousting the Courts of Jurisdiction, May be Valid

This is thought to be the doctrine of the Delaware Co., *v.* Pennsylvania, etc., Co., 50 N. Y. 265, and it is plainly accepted by the Supreme Court of the United States. Hamilton *v.* Liverpool, etc., Insurance Co., 136 U. S. at page 255, 10 Sup. Ct. 945, 34 L. Ed. 419, shows the familiar proviso in an insurance policy by which the *amount* of loss or damage to the property insured shall be ascertained by arbitrators or appraisers, and further that, until such an award should be obtained, the loss should not be payable and no action should lie against the insurer. This makes the appraisal or partial arbitration a condition precedent to suit. Gray, J., said:

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

In Hamilton *v.* Home Insurance Co., 137 U. S. at page 385, 11 Sup. Ct. at page 138, 34 L. Ed. 708, the same learned Justice said (of a somewhat similar proviso in an insurance policy):

"If the contract . . . provides that no action upon it shall be maintained until after such an award, . . . the award is a condition precedent to the right of action."

But persons who would thus far avail themselves of compulsory arbitration must be careful, for it has been said:

"While parties may impose, as a condition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. . . . Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void." Stephenson *v.* Insurance Co., 54 Me. 70, cited in Insurance Co. *v.* Morse, *supra*.

Finally, in Guaranty, etc., Co. *v.* Green Cove, etc., R. R. Co. 139 U. S. at page 142, 11 Sup. Ct. at page 514, 35 L. Ed. 116, Brown, J., considered a proviso in a mortgage to the effect that a sale by the trustee should be "exclusive of all other" methods of sale, and he laid down the law thus:

"This clause, . . . is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which (as is settled by the uniform current of authority) cannot be done."

This decision was filed in 1890. The latest opinion in this circuit known to me is Gough *v.* Hamburg, etc., Co., (D. C.) 158 Fed. 174, where Adams, J., lays down the rule without comment that the limitation upon the jurisdiction of courts contained in a contract is void.

Whatever form of statement the rule takes, the foregoing citations show that it always amounts to the same thing, viz. The courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all business growing out of disputes over contracts by any body of arbitrators, unless compelled to such action by statute. Even such cases as Mittenthal v. Mascagni, 183 Mass. 19, N. E. 425, L. R. A. 812, 97 Am. St. Rep. 404, show no more than a belated acceptance of the right to confine litigation by contract to a particular court, for even that opinion does not recognize the right of mankind to contract themselves out of all courts.[1]

The English Arbitration Act, *supra*, is such a statute. It has compelled the courts of that country to abandon the doctrine that it is wrong or wicked to agree to stay away from the courts when disputes arise. It is highly characteristic of lawyers that, when thus coerced by the Legislature, the wisdom of previous decisions begins to be doubted. In Hamlyn v. Talisker Distillery [1894] App. Cas. 202, Lord Watson said:

[1] For a comparison of earlier cases in Massachusetts with the English cases, see an article on "Arbitration as a Condition Precedent," 11 Harvard Law Rev. 234.

"The rule that a reference to arbitrators not named cannot be enforced does not appear to me to rest on any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely tranched upon by the *legislation* of the last 50 years . . . that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance."

Neither the Legislature of New York nor the Congress has seen fit thus to modernize the ideas of the judges of their respective jurisdictions.

[1] The question presented by these motions is to be regarded as one of general law; i.e., one wherein the courts of the United States are not bound to follow or conform to the decisions of the state jurisdiction in which they may happen to sit. This was intimated by Dallas, J., in Mitchell *v.* Dougherty, 90 Fed. 639, C. C. A. 205, and explicitly held in Jefferson Fire Insurance Co. *v.* Bierce (C. C.) 183 Fed. 588.

Furthermore the question is one of remedy, and not of right. Such was substantially the holding in Mitchell *v.* Dougherty, *supra,* and in Stephenson *v.* Insurance Co., supra, it is pointed out that:

"The law and not the contract prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the courts for their remedy, in a given case, than they have to provide a remedy prohibited by law."

Finally it has been well said by Cardozo, J., in Meacham *v.* Jamestown, etc., R. R. Co., *supra,* that:

"An agreement that . . . differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."

It follows that the final question for determination under these motions is whether the law as laid down by the Supreme Court of the United States permits the enforcement as a remedy of the arbitration clause contained in a contract, assuming that such clause (as here) is intended to oust the courts and all courts of their jurisdiction.[1]

[2] I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter parties is void in a federal forum. It was within the power of that tribunal to make this rule. Inferior courts may find convincing reason for it; but the rule must be obeyed, and these motions severally denied.[2]

[1] It has not seemed necessary to pursue this subject beyond the courts of the United States, New York, and Massachusetts; but, with the possible exception of Pennsylvania, the result would not, I think, be different.

[2] New York now has a statute under which agreements to arbitrate are a bar to actions in the courts. Spiritus Fabriek *v.* Sugar Products Co. 130 N. E. Rep. 288.

SECTION IV

CONTRACTS TENDING TO CORRUPTION

TRIST *v.* CHILD

SUPREME COURT OF THE UNITED STATES, October Term, 1874

[*Reported in* 21 *Wallace,* 441]

APPEAL from the Supreme Court of the District of Columbia; the case being thus:—

N. P. Trist having a claim against the United States for his services, rendered in 1848, touching the treaty of Guadelupe Hidalgo,—a claim which the government had not recognized,—resolved, in 1866-67, to submit it to Congress and to ask payment of it. And he made an agreement with Linus Child, of Boston, that Child should take charge of the claim and prosecute it before Congress as his agent and attorney. As a compensation for his services it was agreed that Child should receive 25 per cent of whatever sum Congress might allow in payment of the claim. If nothing was allowed, Child was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to Congress. Before final action was taken upon it by that body Child died. His son and personal representative, L. M. Child, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim. By an act of the 20th of April, 1871, Congress appropriated the sum of $14,559 to pay it. The son thereupon applied to Trist for payment of the 25 per cent, stipulated for in the agreement between Trist and his father. Trist declined to pay. Hereupon Child applied to the Treasury Department to suspend the payment of the money to Trist. Payment was suspended accordingly, and the money was still in the treasury.

Child, the son, now filed his bill against Trist, praying that Trist might be enjoined from withdrawing the $14,559 from the treasury until he had complied with his agreement about the compensation, and that a decree might pass commanding him to pay to the complainant $5,000 and for general relief.

The defendant answered the bill asserting, with other defences going to the merits, that all the services as set forth in their bill were "of such a nature as to give no cause of action in any court, either of common law or equity."

The case was heard upon the pleading and much evidence. A part of the evidence consisted of correspondence between the parties. It tended to prove that Childs, father and son, had been to see various members of Congress, soliciting their influence in behalf of a

bill introduced for the benefit of Mr. Trist, and in several instances obtaining a promise of it. There was no attempt to prove that any kind of bribe had been offered or even contemplated; but the following letter, one in the correspondence put in evidence, was referred to as showing the effects of contracts such as the one in this case:—

FROM CHILD, JR., TO TRIST.

HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., Feb. 20, 1871.

Mr. TRIST: Everything looks very favorable. I found that my father has spoken to C—— and B——, and other members of the House. Mr. B—— says he will try hard to get it before the House. He has two more chances, or rather, "morning hours," before Congress adjourns. A——will go in for it. D——promises to go for it. I have sent your letter and report to Mr. W——, of Pennsylvania. It may not be reached till next week. Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work even if he knows a page, for a page often gets a vote. The most I fear is indifference.

Yours, &c. L. M. CHILD.

The Court below decreed—

1st. That Trist should pay to the complainant $3,639, with interest from April 20th, 1871.

2nd. That until he did so, he should be enjoined from receiving at the treasury "*any* of the moneys appropriated to him" by the above act of Congress, of April 20th, 1871.

From this decree the case was brought here.

The good character of Messrs. Child, father and son, was not denied.

Messrs. Durant and *Horner,* for the appellants.

Messrs. B. F. Butler and *R. D. Mussey,* contra.

Mr. Justice Swain delivered the opinion of the court.

The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by Congress, until he should have paid the demand of the appellee.

This decree, as regards that portion of the fund not claimed by the appelle, is an anomaly. Why the claim should affect that part of the fund to which it had no relation, is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds upon the ground of the validity of the original contract, and a consequent lien in favor of the complainant

upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation for the fund *pro tanto,* either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor.

Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in no wise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. If there was no lien, there was no jurisdiction in equity.

There is another condition fatally adverse to the claim of a lien. The first section of the act of Congress of February 26, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, ascertainment of the amount due, and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

But there is an objection of still greater gravity to the appellee's case. Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do, and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds: "Please write to any of your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound

policy and good morals. Lord Mansfield said: "Many contracts which are not against morality are still void as being against the maxims of sound policy."

It is a rule of the common law of application, that where a contract expressed or implied is tainted with either of the vices last named, as to the consideration of the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are:—

An agreement to pay for supporting for election a candidate for sheriff; to pay for resigning a public position to make room for another; to pay for not bidding at a sheriff's sale of real property; to pay for not bidding for articles to be sold by the government at auction; to pay for not bidding for a contract to carry the mail on a specified route; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself; to pay for procuring a contract from the government; to pay for procuring signatures to a petition to the governor for a pardon; to sell land to a particular person when the surrogate's order to sell should have been obtained; to pay for suppressing evidence and compounding a felony; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution; to pay for promoting a marriage; to influence the disposition of property by will in a particular way.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptional.[1] But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows was resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practised by all paid lobbyists in the prosecution of their business.

[1] Salinas *v.* Stillman, 66 Fed. Rep. (C. C. A.) 677; Bergen *v.* Frisbie, 125 Cal. 168; Barry *v.* Capen, 151 Mass. 99; Chesebrough *v.* Conover, 140 N. Y. 382; Yates *v.* Robertson, 80 Va. 475; Houlton *v.* Nichol, 93 Wis. 393, *acc.* See also Davis *v.* Commonwealth, 164 Mass. 241; 3 Williston, Contracts, § 1727.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. The theory of our government is that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would

invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defenditis.* Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to

Dismiss the bill.[1]

[1] Providence Tool Co. *v.* Norris, 2 Wall. 45; Oscanyan *v.* Arms Co., 103 U. S. 261; Findlay *v.* Pertz, 66 Fed. Rep. (C. C. A.) 427; Hayward *v.* Nordberg Mfg. Co., 85 Fed. Rep. (C. C. A.) 4; Hunt *v.* Test, 8 Ala. 713; Weed *v.* Black, 2 McArthur (D. C.), 268; Doane *v.* Chicago City R. R. Co., 160 Ill. 22; Bermudez Co. *v.* Crichfield, 62 Ill. App. 221, 174 Ill. 466; Elkhart County Lodge *v.* Crary, 98 Ind. 238; Kansas, &c. Ry. Co. *v.* McCoy, 8 Kan. 543; McBratney *v.* Chandler, 22 Kan. 692; Deering *v.* Cunningham, 63 Kan. 174; Wood *v.* McCann, 6 Dana, 366; Wildly *v.* Collier, 7 Md. 273; Houlton *v.* Dunn, 60 Minn. 26; Richardson *v.* Scott's Bluff County, 59 Neb. 400; Lyon *v.* Mitchell, 36 N. Y. 235; Mills *v.* Mills, 40 N. Y. 546; Veazey *v.* Allen, 173 N. Y. 359; Winpenny *v.* French, 18 Ohio St. 469; Sweeney *v.* McLeod, 15 Oreg. 330; Clippinger *v.* Kepbaugh, 5 W. & S. 315; Spalding *v.* Ewing, 149 Pa. 375; Powers *v.* Skinner, 34 Vt. 274; Bryan *v.* Reynolds, 5 Wis. 200; Chippewa Valley Co. *v.* Chicago, &c. Co., 75 Wis. 224; Houlton *v.* Nichol, 93 Wis. 393, *acc.* See also Washington Irrigation Co. *v.* Krutz, 119 Fed. Rep. (C. C. A.) 279; Brown *v.* First Nat.

MEGUIRE *v.* CORWINE

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1897

[*Reported in* 101 *United States,* 108]

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. *Frederick P. Stanton,* for the plaintiff in error.

Mr. *Enoch Totten,* for the defendant in error.

Mr. JUSTICE SWAYNE delivered the opinion of the court:—

The plaintiff in the court below is the plaintiff in error here.

The first count of the declaration avers that in consideration of the assistance to be rendered by him to the defendant's testator in procuring him to be appointed special counsel of the United States in certain litigated cases known as the "Farragut prize cases," and also in consideration of the assistance to be rendered by the plaintiff in managing and carrying on the defence in those cases,—which assistance was accordingly rendered, the testator promised the plaintiff to pay him one half of all the fees which the testator should receive as such special counsel, and that the testator did receive as such special counsel in those cases $29,950, of which sum the plaintiff was entitled to be paid one half, &c.

The second count is substantially the same with the first, except that it avers the consideration of the contract to have been the assistance to be rendered by the plaintiff in the defence of the cases named, and is silent as to the stipulation that he was to assist in procuring the appointment of the testator as special counsel for the government.

The third is a common count alleging the indebtedness of the testator to the defendant for work and labor to the amount of $12,975.

It appears by the bill of exceptions that the plaintiff called three witnesses to establish the contract upon which he sought to recover.

Bank, 137 Ind. 655; Thompson *v.* Wharton, 7 Bush, 563; Buck *v.* First Nat. Bank, 27 Mich. 293; 2 Williston, Contracts, § 1727.

In Southard *v.* Boyd, 51 N. Y. 177, the defendant, a ship-owner, residing in Boston, hearing of the Banks expedition, came to New York, seeking employment in this expedition for one of his ships known as the "Red Gauntlet." Failing to charter it himself, he called at the office of the plaintiffs and left his ship for charter, limiting them, however, to a charter for *troops*, and returned to Boston. At this interview he was informed that the commissions, in case of charter, would be five per cent. In its opinion the court say: "The further claim is made that the contracts with the plaintiff was for an illegal service, in that they charged a commission for claiming to have influence with a government agent to accept a vessel already offered, but not yet accepted. It is true that one of the plaintiffs was a son, and that another was a son-in-law of one of the government agents, whose business it was to select the vessels for the government, and the plaintiffs probably had facilities for chartering vessels which others did not have. But the plaintiffs did not contract to do an illegal service. They did not agree to use any corrupt means to procure the charter. The fact that the plaintiffs had intimate relations with the government agents, and could probably therefore influence their action much more readily than others, did not forbid their employment. Lyon *v.* Mitchell, 36 N. Y. 235."

Lovel testified that "the testator also stated that he had agreed to pay the plaintiff one half of all the fees he should receive in said cases, for his aid in getting the appointment of special counsel and for the assistance which the plaintiff was to render in procuring testimony and giving information for the management of the defence in said cases."

"On cross-examinaton, the witness said he knew, before his said conversation with R. M. Corwine, and before Corwine was employed, that Mr. Meguire, the plaintiff, had the selection of counsel in said cases, the Treasury department only restricting him to the selection of a man who was familiar with admiralty practice, and Mr. Meguire was to utilize the information he professed to have at that time. The bargain, as witness understood it, was that, in consideration of Meguire's procuring Corwine to be employed as special counsel in those cases, and of assisting him in getting evidence and information, Corwine agreed to pay to the plaintiff (Meguire) one half of the fees which he (Corwine) might receive from the United States for services in said cases.

"The plaintiff then called Lewis S. Wells, another witness in his behalf, who, being duly sworn, stated that since the commencement of this suit—he thought some time last year—he met the testator (R. M. Corwine, deceased) in the Treasury department, and had a conversation with him about the plaintiff and the Farragut cases. Mr. Corwine was very angry, and said that he had agreed to pay Mr. Meguire one half of his fees in the Farragut cases, and paid him one half the retainer received in 1869, and $4,000 in July, 1873, and had taken his receipt in full. That he had found out that plaintiff had not been the means of his appointment as special counsel, and he thought he had paid the plaintiff enough."

Wells testified further that upon two occasions the testator told him the plaintiff was assisting him in the preparation of the defence in the Farragut cases, and that he had agreed to pay to the plaintiff one half of his fees for the plaintiff's services. This is all that is found in the record touching the terms and consideration of the contract. It was in proof by a late solicitor of the treasury that the plaintiff strongly urged on him the employment of the testator as special counsel, and that at the instance of the plaintiff he called the attention of the Secretary of the Treasury to the subject, and that the appointment of the testator was thus brought about. The plaintiff had been a clerk in New Orleans, in the office of Colonel Holabird, Chief Quartermaster of the Department of the Gulf, during the war, and had possession of Holabird's papers, from which he derived the facts communicated to the testator for the defence of government in the prize suits in question. It was not controverted that the amount of fees received by the testator was $25,950, and that he paid over to the plaintiff $4,475 before the breach occurred between them. The further sum of $8,500 was claimed by the plaintiff, and this

suit was brought to recover it. The learned counsel for the plaintiff in error complains in his brief that "in the charge of the court, page 10, the jury was instructed that 'the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury should find that the parties had made another and a distinct contract;' and in the first instruction asked by the defendants and given by the court the jury were told 'that such an arrangement is void, because it is contrary to public policy, and the plaintiff cannot recover in any form of action for any services rendered or labor performed in pursuance thereof.' . . . There can be no doubt that this charge was fatal to the plaintiff's whole case. The jury was not allowed to infer, as they well might have done from the testimony of more than one of the witnessess, that the testator, after his appointment as special counsel, recognized an implied agreement to pay the plaintiff half of his fees for the services of the latter rendered during the progress of the business."

In our view of the record this is the turning point of the case. The objection taken to the instructions referred to is not so much to them in the abstract as the concrete. The complaint is that they closed the door against the inference of another contract which the jury might have drawn from the testimony in the case. To this there are several answers. If there were such testimony, it should have been set forth in the record. After a careful examination, we should have been unable to find any. The instructions expressly saved the right of the jury to find another and a different contract, and their attention was called to the subject. They found none. The contract objected to by the court as fatally tainted was proved by witnessess called by the plaintiff himself. He neither proved nor attempted to prove any other. It was, then, neither claimed nor intimated that any other had been made. After the views of the court were announced it was too late for the plaintiff to change his position and claim for the jury the right to wander at large in the field of conjecture and find as a fact what the evidence wholly failed to establish, and which, if found, would have thrown on the court the necessity to set aside the verdict and award a new trial.

A judge has no right to submit a question where the state of the evidence forbids it. Michigan Bank *v.* Eldred, 9 Wall. 544. On the contrary, where there is an entire absence of testimony, or it is all one way, and its conclusiveness is free from doubt, it is competent for the court to direct the jury to find accordingly. Merchants' Bank *v.* State Bank, 10 id. 604. The practice condemned in Michigan Bank *v.* Eldred is fraught with evil. It tends to create doubts which otherwise might not, and ought not to exist, and may confuse the minds of the jury and lead them to wrong conclusions. If the instructions here under consideration are liable to any criticism, it is that they were more favorable to the plaintiff in error than he had a right to claim.

The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications. Marshall *v.* Baltimore & Ohio Railroad Co., 16 How. 314; Tool Company *v.* Norris, 2 Wall. 45; Trist *v.* Child, 21 id. 441; Coppel *v.* Hall, 7 id. 542. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new support. They do not need it. Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism.

In Trist *v.* Child (*supra*), while recognizing the validity of an honest claim for services honestly rendered, this court said: "But they are blended and confused with those which are forbidden; the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally, in all its parts, the entire body of the contract. In all such cases *potior conditio defendentis*. .Where there is turpitude, the law will help neither party." These remarks apply here. The contract is clearly illegal, and this action was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. The case being fundamentally and fatally defective, he could not recover. Conceding all his exceptions, other than those we have considered, to be well taken, the errors commited could have done him no harm, and opposite rulings would have done him no good. In either view, these alleged errors are an immaterial element in the case. Barth v. Clise, Sheriff, 12 Wall. 400. *Judgment affirmed.*[1]

GEORGE A. GUERNSEY *v.* JAMES P. COOK

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 10–*September* 8, 1876

[*Reported in* 120 *Massachusetts,* 501]

COLT, J. The contract declared on has been held to be the personal contract of the defendant. 117 Mass. 548. It provided in sub-

[1] See also Schloss *v.* Hewlett, 81 Ala. 266; Edwards *v.* Randle, 63 Ark. 216; Martin *v.* Wade, 37 Cal. 168; Conner *v.* Canter, 15 Ind. App. 690; Glover *v.* Taylor, 38 La. Ann. 634; Harris *v.* Chamberlain, 126 Mich. 280; Dickson *v.* Kittson, 75 Minn. 168; Gray *v.* Hook, 4 N. Y. 449; Basket *v.* Moss, 115 N. C. 448; Hunter *v.* Nolf, 71 Pa. 282; Whitman *v.* Ewin, 39 S. W. Rep. (Tenn. Ch.) 742; Willis *v.* Compress Co., 66 S. W. Rep. (Tex. Civ. App.) 472; Meacham *v.* Dow, 32 Vt. 71. See further 2 Williston, Contracts, §§ 1730, 1732.

On the validity of contracts relating to the location of railroads, railroad stations or public buildings, see *ibid.*, § 1733.

stance on the part of the defendant, and Mr. Beebe, who together owned a majority of the stock of the India Company, that the plaintiff should be made treasurer of that company at a stipulated salary; the plaintiff on his part agreeing to take part of their stock at par, with an agreement that it should be taken back, and an allowance made for interest, "in case it should be desirable for any reason to dispense with the plaintiff's service as treasurer." The question is whether such a contract is void as being against public policy. Its decision depends upon the construction which must be fairly given to the terms of the contract.

In consideration of the purchase of a part of their stock at a price named, two of the stockholders agree to secure to the purchaser the treasurership of the corporation, of which they are members, and to secure to him also a sum named, as the annual salary of the office. The purchase of the defendant's stock and the agreement relating to the office are incorporated into the contract as part of one transaction; and each agreement is the valuable consideration of the other. The contract, if reasonably susceptible of two meanings, one legal and the other not, must indeed receive an interpretation which will support rather than defeat it, and the presumption is in favor of its legality. But this contract necessarily implies that the defendant intended to derive, and the plaintiff intended to give to him, a private advantage, not shared by the other stockholders, in consideration of his election as treasurer. And there is nothing in the facts disclosed at the trial to show that such was not in fact the result of the transaction, or that the agreement in question was known and consented to by the other members of the corporation.

It was the purpose and effect of the contract to influence the defendant, in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promise was placed under direct inducement to disregard his duties to the other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him only to look to the best interest of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates.

In Fuller *v.* Dame, 18 Pick. 472, a contract was held to be contrary to public policy, and to open, upright, and fair dealing, which tended injuriously to affect the interest of the corporations of which the promisee was a member. It was compared to the case of a composition deed where all the creditors release the common debtor upon the payment of a certain percentage, and where a stipulation for a separate and distinct advantage is held to be a fraud on other creditors and void. Case v. Gerrish, 15 Pick. 49. Upon the same principle, agreements not to bid against others at a public auction, as well as agreements for the employment of underbidders

and puffers, are held to be a fraud upon the bidders at the sale, and void as against public policy. So contracts with brokers or agents, upon a consideration founded on violations of duty to the principal, are void. Smith *v.* Townsend, 109 Mass. 500; Phippen *v.* Stickney, 3 Met. 384; Gibbs *v.* Smith, 115 Mass. 592; Curtis *v.* Aspinwall, 114 Mass. 187. See also Waldo *v.* Martin, 4 B. & C. 319; Marshall *v.* Baltimore & Ohio Railroad, 16 How. 314; Elliot *v.* Richardson, L. R. 5 C. P. 744.

Upon the facts disclosed, this action, which is not in avoidence but in direct affirmance of the contract, cannot be maintained. White *v.* Franklin Bank, 22 Pick. 181. The objection that the contract is illegal, although it comes with no good grace from the defendant, is allowed to prevail, not as a protection to him, but for the sake of the public good, and because the court will not lend its aid to enforce an illegal contract. Myers *v.* Meinrath, 101 Mass. 366; Taylor *v.* Chester, L. R. 4 Q. B. 309.

Judgment for the defendant.[1]

HENRY HOLCOMB *v.* THOMAS H. WEAVER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 25, 1883–January 29, 1884

[*Reported in* 136 *Massachusetts,* 265]

HOLMES, J. The plaintiff in New Bedford was written to from New York on behalf of the Pasque Island Club, and requested to find a builder who could erect a building for them cheaper than the New York builders. The letter continued, "but we only want parties that you can endorse in every way responsible and reliable." The plaintiff in reply introduced the defendant, who made his estimates, was employed, erected the building, and was paid. At an early stage of the proceedings the plaintiff asked and obtained a promise from the defendant to pay $250, "as a commission or compensation for his trouble in the matter," which is the promise sued upon. The plaintiff testified that this promise was made without the knowledge even of the club, but that he expected no pay from them for procuring the defendant to erect the building. The

[1] West *v.* Camden, 135 U. S. 507; Noel *v.* Drake, 28 Kan. 265; Noyes *v.* Marsh, 123 Mass. 286; Woodruff *v.* Wentworth, 133 Mass. 309; Wilbur *v.* Stoepel, 82 Mich. 344; Cone *v.* Russell, 48 N. J. Eq. 208; Fenness *v.* Ross, 5 N. Y. App. Div. 342; Snow *v.* Church, 13 N. Y. App. Div. 108; Gage *v.* Fisher, 5 N. Dak. 297; Withers *v.* Edwards, 62 S. W. Rep. (Tex.) 795, *acc.*

See also Elliott *v.* Richardson, L. R. 5 C. P. 744; Blue *v.* Capital Nat. Bank, 145 Ind. 518; McClure *v.* Law, 161 N. Y. 78; Gilbert *v.* Finch, 173 N. Y. 455; Wood *v.* Manchester, &c. Co., 54 N. Y. App. Div. 522; Flaherty *v.* Cary, 62 N. Y. App. Div. 1. But compare Almy *v.* Orne, 165 Mass. 126; Gassett *v.* Glazier, 165 Mass. 473; Seymour *v.* Detroit, &c. Mills, 56 Mich. 117; Barnes *v.* Brown, 80 N. Y. 527; Bonta *v.* Gridley, 77 N. Y. App. Div. 33; Manson *v.* Curtis, 223 N. Y. 313.

court ruled that the plaintiff could not recover; and the plaintiff excepted.

The ruling was clearly right. The plaintiff was not merely asked to introduce a possible contractor, who was to be dealt with by the club on the same footing as any one else, and to stand at no advantage in bargaining with them by reason of the introduction, as in Rupp v. Sampson, 16 Gray, 398. He was asked to recommend some one as in every way responsible. His recommendation obviously was expected to have weight with the club, and did have it. If his agreement with the defendant was made before his recommendation, it had a necessary tendency to give bias to what they knew the club relied on as disinterested. A recommendation under these circumstances would have been a fraud, even if gratuitous, and it is therefore immaterial whether the club was to pay for it or not, although it is hard to see why the plaintiff could not have recovered for his trouble if he had dealt fairly. If, then, the agreement was made at the time supposed, it was open to all the objections so fully stated in Fuller v. Dame, 18 Pick. 472, and was void by that and other Massachusetts decisions. Rice *v.* Wood, 113 Mass. 133. See also Atlee *v.* Fink, 75 Mo. 100; Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549; Panama & South Pacific Telegraph *v.* India Rubber, Gutta Percha, & Telegraph Works, L. R. 10 C. H. 515.

The agreement was open to the same objections on another ground, whether made before or after the plaintiff had written his recommendation. It was made at all events before the defendant had completed his bargain with the club. The parties knew that the club were seeking to get the work done as cheaply as they could get a trustworthy man to do it. If the defendant had to pay the plaintiff, he would naturally charge it to the club in his estimate, or in some way make the club pay him back. The tendency of the contract was to induce the defendant to charge, and to make the club pay, more than was necessary or fair, when the plaintiff had led them to expect that they would be dealt with honestly and economically, and certainly with no adverse interest emanating from the plaintiff.

We may add, that, if the date of the promise in suit were material and left in doubt, we should assume the fact to be that which was most favorable to the ruling; and also that, if the promise was made after the plaintiff had written to New York recommending the defendant, the plaintiff would have a great deal of difficulty in showing a consideration which was not executed before the promise was made. For the trouble for which the plaintiff was to have a commission obviously meant his recommendation of the defendant. He does not appear to have taken any other. *Judgment affirmed.*

SECTION V.

MISCELLANEOUS CASES OF ILLEGAL CONTRACTS

HOLMAN ET AL. *v.* JOHNSON

IN THE KING'S BENCH, July 5, 1775

[*Reported in* 1 *Cowper,* 341]

ASSUMPSIT for goods sold and delivered: Plea *non assumpsit,* and verdict for the plaintiff. Upon a rule to show cause why a new trial should not be granted, Lord Mansfield reported the case, which was shortly this: The plaintiff, who was resident at and inhabitant of Dunkirk, together with his partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England; they had, however, no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the common and ordinary course of their trade.

Mr. Mansfield, for the defendant.

Mr. *Dunning,* Mr. *Davenport,* and Mr. *Buller,* for the plaintiff.

LORD MANSFIELD. There can be no doubt that every action tried here must be tried by the law of England; but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the revenue laws of another.

The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ,* or the transgression of a positive law in this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defend-

ant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defenditis.*

The question therefore is, whether in this case the plaintiff's demand is founded upon the ground of any *immoral* act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris.* What, then, is the contract of the plaintiff? It is this: being a resident and inhabitant of Dunkirk, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dunkirk to the defendant's order, to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for the goods sold and delivered at Dunkirk. Where, then, or in what respect is the plaintiff guilty of any crime? Is there any law of England transgresed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but he has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should suceed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at Dunkirk.

To what a dangerous extent would this go if it were to be held a crime. If contraband clothes are bought in France, and brought home hither, or if glass bought abroad, which ought to pay a great duty, is run into England, shall the French tailor or the glass manufacturer stand to the risk or loss attending their being run into England? Clearly not. Debt follows the person, and may be recovered in England, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore, I am clearly of the opinion that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any act of Parliament.

I am very glad the old books have been looked into. The doctrine Huberus lays down is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the case in question thus (Tit. *de conflictu legum,* vol. ii. p. 539): "In certo loco merces quædam prohibitæ sunt. Si vendantur ibi, contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia, contractus inde ab initio validus fuit." Translated, it might be rendered thus: In England, tea which has not paid duty is prohibited; and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is

brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid. He goes on thus: "Verum si merces venditæ in altero loco, ubi prohibitæ sunt essent tradenæ, jam non fieret condemnatio, quia repugnaret hoc juri et commodo reipublicæ quæ merces prohibuit." Apply this in the same manner. But if the goods were to be delivered to England, where they are prohibited, the contract is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the State if such an action could be maintained.

The gist of the whole turns upon this, that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price; and the plaintiff had undertaken to send it into England, or had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly had offended against no law of England. Therefore, let the rule for a new trial be discharged.

The three other judges concurred.

PEARCE AND ANOTHER *v.* BROOKS

IN THE EXCHEQUER CHAMBER, APRIL 17, 1866

[*Reported in Law Reports,* 1 *Exchequer,* 213]

DECLARATION stating an agreement by which the plaintiffs agreed to supply the defendant with a new miniature brougham on hire, till the purchase money should be paid by installments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay 50*l.* down; in case the brougham should be returned before a second installment was paid, a forfeiture of fifteen guineas was to be paid in addition to the 50*l.*, and also any damage except fair wear. Averment, that the defendant returned the brougham before the second installment was paid, and that it was damaged. Breach, nonpayment of fifteen guineas, or the amount of the damage. Money counts.

Plea 3, to the first count, that at the time of making the supposed agreement the defendant was to the knowledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The case was tried before Bramwell, B., at Guildhall, at the sittings after Michaelmas Term, 1865. It then appeared that the plaintiffs were coach builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution; and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution.

The learned judge ruled that the allegation in the plea as to the mode of payment was immaterial, and he put to the jury the following questions: 1. Did the defendant hire the brougham for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found the carriage was used by the defendant as part of her display, to attract men; and that the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage.

On this finding the learned judge directed a verdict for the defendant, and gave the plaintiffs leave to move to enter a verdict for them for the fifteen guineas penalty.

M. Chambers, Q. C., in Hilary Term, obtained a rule accordingly, on the ground that there was no evidence that the plaintiffs knew the purpose for which the brougham was to be used; and that if there was, the allegation in the plea that the plaintiffs expected to be paid out of the receipts of defendant's prostitution was a material allegation, and had not been proved. Bowry *v.* Bennett, 1 Camp. 348.

[Pollock, C. B., referred to Cannan *v.* Bryce, 3 B. & A. 179.]

Digby Seymour, Q. C., and *Beresford,* showed cause. No direct evidence could be given of the plaintiff's knowledge that the defendant was about to use the carriage for the purpose of prostitution; but the fact that a person known to be a prostitute hires an ornamental brougham is sufficient ground for the finding of the jury.

[Bramwell, B. At the trial I was first disposed to think that there was no evidence on this point, and I put it to the jury, that, in some sense, everything which is supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a streetwalker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but they must be such as would under the circumstances not be required, except with that view. The jury, by the mode in which they answered the question, showed that they appreciated the distinction; and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the

purposes of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients; and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.]

Upon the second point, the case of Bowry *v.* Bennett, 1 Camp. 348, falls short of proving that the plaintiff intended to be paid out of the proceeds of the illegal act. The report states that the evidence of the plaintiff's knowledge of the defendant's way of life was "very slight;" and Lord Ellenborough appears to have referred to the intention as to payment, not as a legal test, but as a matter of evidence with reference to the particular circumstances of the case. The goods supplied there were clothes; without other circumstances there would be nothing illegal in selling clothes to a known prostitute; but if it were shown that the seller intended to be paid out of her illegal earnings, the otherwise innocent contract would be vitiated. Neither is Lloyd *v.* Johnson, 1 B. & P. 340, cited in the note to the last case, an authority for the plaintiffs, for their part of the contract would have been innocent, and all that the court says is, that it cannot " take into consideration which of the articles were used by the defendant to an improper purpose, and which were not;" they had no materials for doing so. The present case rather resembles the case of Crisp *v.* Churchill, cited in Lloyd *v.* Johnson, 1 B. & P. 340, where the plaintiff was not allowed to recover for the use of the lodgings let for the purpose of prostitution. Appleton *v.* Campbell, 2 C. & P. 347, is to the same effect.

M. Chambers, Q. C., and *J. O. Griffits*, in support of the rule. As to the first point, the expressions of Butler, J., in Lloyd *v.* Johnson, 1 B. & P. at page 341, are strongly in the plaintiff's favor, especially his remarks on the case of the lodgings: "I suppose the lodgings were hired for the express purpose of two persons meeting there." But in this case it is impossible to say that there was any express purpose of prostitution; the defendant might have used the brougham for any purpose she chose, as to take drives, to go to the theatre, or to shop. Even if there were evidence, the jury have not found the purpose with sufficient distinctness. But secondly, the last allegation in the plea is material; the plaintiffs must intend to be paid out of the proceeds of the immoral act. The words of Lord Ellenborough in Bowry *v.* Bennett, 1 Camp. 348, are very plain; the plaintiff must "expect to be paid from the profits of the defendant's prostitution."

[BRAMWELL, B. At the trial I refused to leave this question to the jury, but it has since occurred to me that the matter was doubtful. The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall use it. Suppose, however, a person were to buy a pistol, saying to the seller that he means with

it to shoot a man and rob him; is the act of the seller illegal, or is it further necessary that he should stipulate to be paid out of the proceeds of the robbery? If the looking to the proceeds is necessary to make the transaction illegal, is it also necessary that it should be part of the contract that he shall be so paid?]

Suppose a cab to be called by a prostitute, and the driver directed to take her to some known place of ill fame, could it be said that he could not claim payment?

[Bramwell, B. If he could, this absurdity would follow, that if a man and a prostitute engaged a cab for that purpose, and if, to meet your argument, the driver reckoned on payment, as to the woman, out of the proceeds of her prostitution, the woman would not be liable, but the man would, although they were engaged in the same transaction and for the same purpose.]

If the contract is void for this reason, the plaintiffs were entitled to resume possession, and to bring trover for the carriage; a test, therefore, of the question will be, whether in such action, if the jury found the same verdict as they have found here, on the same evidence, the plaintiffs would be entitled to recover.

[Martin, B. I think they would; and that if the carriage had not been returned in this case, the plaintiffs would, on our discharging this rule, be entitled to determine the contract on the ground of want of reciprocity, and to claim the return of the article.]

Pollock, C. B. We are all of opinion that this rule must be discharged. I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say that since the case of Cannan *v.* Bryce, 3 B. & A. 179, cited by Lord Abinger in delivering the judgment of this court in the case of M'Kinnel *v.* Robinson, 3 M. & W. at p. 441, and followed by the case in which it was so cited, I have always considered it as settled by law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was never considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be the law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of the maxim, and the effect is the same; no cause of action can arise out of either the one or the other. The rule of the law was well settled in Cannan *v.* Bryce, 3 B. & A. 179 that was a case which at time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to

regard with surprise. But the learned judge (then Sir Charles Abbott) who decided it, though not distinguished as an advocate, nor at first eminent as a judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically *his* judgment; it was assented to by all the members of the Court of King's Bench, and is now the law of the land. If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favorable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. I cannot go with Mr. Chambers in thinking that everything must be found by a jury in such a case with that accuracy from which ordinary decency would recoil. For criminal law it is sometimes necessary that details of a revolting character should be found distinctly, and minutely, but for civil purposes it is not necessary. If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiff's knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency. I agree with my brother Bramwell that the verdict was right and that the rule must be discharged.[1] *Rule discharged.*[2]

CHESTER H. GRAVES AND OTHERS *v.* WALTER B. JOHNSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 26–May 6, 1892, and March 13–May 22, 1901

[*Reported in* 156 *Massachusetts,* 211, *and* 179 *Massachusetts,* 53.]

HOLMES J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine, against the laws of that State. These are all the material facts reported; and these findings we must assume to have been warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit

[1] MARTIN, PIGOTT, BRAMWELL, BB., and POLLOCK, C. B., delivered concurring opinions.

[2] See the English decisions reviewed in Benjamin on Sales, § 506, *et seq.* Compare Postelle *v.* Rivers, 112 Ga. 850; Hubbard *v.* Moore, 24 La. Ann. 591; Sampson *v.* Townsend, 25 La Ann. 78; Mahood *v.* Tealza, 26 La. Ann. 108; Anheuser-Busch Brewing Assoc. *v.* Mason, 44 Minn. 318; Sprague *v.* Rooney, 82 Mo. 493, 104 Mo. 349; Ernst *v.* Crosby, 140 N. Y. 364; Bishop *v.* Honey, 34 Tex. 245; Reed *v.* Brewer, 90 Tex. 144; Hunstock *v.* Palmer, 23 S. W. Rep. (Tex. Civ. App.) 294; Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670; and see 2 Williston, Contracts, § 1755.

the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the general law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought here. It is noticeable, and has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. Holman *v.* Johnson, 1 Cowp. 341; Pollock, Con (5th Ed.) 308. See also M'Intyre *v.* Parks, 3 Met. 207.

The assertion of that right, however, no doubt was in the interest of English Commerce (Pellecat *v.* Angell, 2 Cr., M. & R. 311, 313), and has not escaped criticism (Story, Confl. Laws, §§ 257, 264, note, 3 Kent Com. 265, 266, and Wharton, Confl. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See Hodgson *v.* Temple, 5 Taunt. 181; Brown *v.* Duncan, 10 B. & C. 93, 98, 99; Harris *v.* Runnels, 12 How. 79, 83, 84.

Of course it would be possible for an independent State to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. Pollock, Con. (5th ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. Waymell *v.* Reed, 5 T. R. 599; Gaylord *v.* Soragen, 32 Vt. 110; Fisher *v.* Lord, 63 N. H. 514; Hull *v.* Ruggles, N. Y. 424, 429.

On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. Finch *v.* Mansfield, 97 Mass. 89, 92; Adams *v.* Coulliard, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. Hayes *v.* Hyde Park, 153 Mass. 514, 515, 516.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the

connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell, in violation even of the domestic law. Tracy *v.* Talmage, 4 Kernan, 162; Hodgson *v.* Temple, 5 Taunt. 181. So of the law of another State. M'Intyre *v.* Parks, 3 Met. 207; Sortwell *v.* Hughes, 1 Curt. C. C. 244; Green *v.* Collins, 3 Cliff. 494; Hill *v.* Spear, 50 N. H. 253. (Dater *v.* Earl, 3 Gray, 483, is a decision on New York Law.)

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way. Finch *v.* Mansfield, 97 Mass. 89, 92; Suit *v.* Woodhall, 113 Mass 391, 395. And the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law. Pearce *v.* Brooks, L. R. 1 Ex. 213; Taylor *v.* Chester, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another State has just so much greater proximity to a breach of the Massachusetts law as implied in the statement that it was made with a view to such a breach, it is void. Webster *v.* Munger, 8 Gray, 584; Orcutt *v.* Nelson, 1 Gray, 536, 551; Hubbell *v.* Flint, 13 Gray, 277, 279; Adams *v.* Coulliard, 102 Mass. 167, 172, 173. Even in Green *v.* Collins and Hill *v.* Spear, the decision in Webster *v.* Munger seems to be approved. See also Langton *v.* Hughes, 1 M. & S. 593; M'Kinnell *v.* Robinson, 3 M. & W. 434, 441; White *v.* Buss, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles explained in Hayes *v.* Hyde Park, 152 Mass. 514, and Tasker *v.* Stanley, 153 Mass. 148. The overt act of selling, which otherwise would be too remote from the apprehended result, an unlawful sale by some one else, would be connected with it, and taken out of the protection of the law by the fact that the result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the same in Maine—the tendency of the act to produce the result—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection

is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. Compare Commonwealth *v.* Churchill, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in Webster *v.* Munger, and to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act. See Commonwealth *v.* Harrington, 3 Pick. 26.

The ground of the decision in Webster *v.* Munger is, that contracts like the present are void. If the contract had been valid, it would have been enforced. Dater *v.* Earl, 3 Gray, 482; M'Intyre *v.* Parks, 3 Met. 207. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori.* For if such a distinction is ever sound, and again if the same principles are not always to be applied, whether the law to be violated is that of the State of the contract or of another State (see Tracy *v.* Talmage, 4 Kernan, 162, 213), at least the right to contract with a view to a breach of the laws of another State of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part of our own citizens. Territ *v.* Bartlett, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by Webster *v.* Munger, and we believe that it would have been decided as we decide it, if the action had been brought in Maine instead of here. Banchor *v.* Mansel, 47 Maine, 58.

Exceptions sustained.

Holmes C. J. This is the second time that this case comes before this court. 156 Mass. 211. It is a suit for the price of intoxicating liquors sold here. At the first trial it was found that they were sold with a view to their being resold by the defendant in Maine against the laws of that State; and on that state of facts it was held that the action would not lie. At the second trial it was found that the plaintiff's agent supposed, rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were and were known by the defendant to be indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. Seemingly the plaintiffs did not act in the aid of the defendant's intent beyond selling him their goods. The judge refused to rule that the plaintiffs' knowledge of the defendant's intent would prevent their recovery, and the case is here again on exceptions.

The principles involved are stated and some of the cases are col-

lected in the former decision. All that it is necessary for us to say now is that in our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent, closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiff's knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiffs to cooperate with the defendant's present intent, such as was supposed in the former decision, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts (Commonwealth *v.* Peaslee, 177 Mass. 267; Commonwealth *v.* Kennedy, 170 Mass. 18, 22), the line of proximity will vary somewhat according to the gravity of the evil apprehended, Steele *v.* Curle, 4 Dana, 381, 385–388, Hanauer *v.* Doane, 12 Wall. 342, 446; Bickel *v.* Sheets, 24 Ind. 1, 4,[1] and in different courts with regard to the same or similar matters. Compare Hubbard *v.* Moore, 24 La. Ann. 591; Michael *v.* Bacon, 49 Mo. 474, with Pearce *v.* Brooks, L. R. 1 Ex. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. M'Intyre *v.* Parks, 3 Met. 207; Sortwell *v.* Hughes, 1 Curt. C. C. 244, 247; Green *v.* Collins, 3 Cliff. 494; Hill *v.* Spear, 50 N. H. 253; Tracy *v.* Talmage, 4 Kernan, 162; Distilling Co. *v.* Nutt, 34 Kan. 724, 729; Webber *v.* Donnelly, 33 Mich. 469; Tuttle *v.* Holland, 43 Vt. 542; Braunn *v.* Keally, 146 Pa. St. 519, 524; Wallace *v.* Lark, 12 S. C. 576, 578; Rose *v.* Mitchell, 6 Col. 102; Jameson *v.* Gregory, 4 Met. (Ky.) 363, 370; Bickel *v.* Sheets, Hubbard *v.* Moore, and Michael *v.* Bacon, *ubi supra*.[2]

Although a different rule was assumed in Suit *v.* Woodhall, 113 Mass. 391, it will seen that it equally was assumed by the instructions given at the trial, and that the exceptions and the point decided in that case concerned only the imputation to the plaintiffs of their agent's knowledge. M'Intyre *v.* Parks never has been overruled. Dater *v.* Earl, 3 Gray, 482; Webster *v.* Munger, 8 Gray, 584, 587;

[1] See also Green *v.* Collins, 3 Cliff. 494; Tracy *v.* Talmage, 14 N. Y. 162, 215.

[2] Longnecker *v.* Shields, 1 Col. App. 264; Singleton *v.* Bank of Monticello, 113 Ga. 527; Sondheim *v.* Gilbert, 117 Ind. 71; Jackson *v.* City Bank, 125 Ind. 347; Brunswick *v.* Valleau, 50 Iowa, 120; Feineman *v.* Sacho, 33 Kan. 621; Tyler *v.* Carlisle, 79 Me. 210; Gambs *v.* Sutherland's Est., 101 Mich. 355; Chamberlin *v.* Fisher, 117 Mich, 428; Darling *v.* Kip, 93 Neb. 781; Main *v.* Berlin Dry Goods Co., 75 N. H. 511; Brooklyn Co. *v.* Standard Co., 120 N. Y. App. D. 237; Waugh *v.* Beck, 114 Pa. 422; Gaylord *v.* Soragen, 32 Vt. 110, *acc.* See also Corbin *v.* Wachhorst, 73 Cal. 411.

But see, *contra*, Milner *v.* Patton, 49 Ala. 423; Oxford Iron Co. *v.* Spradley, 51 Ala. 171; Ware *v.* Jones, 61 Ala. 288; Lewis *v.* Latham, 74 N. C. 283; and compare Plank *v.* Jackson, 128 Ind. 424; Williamson *v.* Baley, 78 Mo. 636; Fisher *v.* Lord, 63 N. H. 514; Hill *v.* Ruggles, 56 N. Y. 424; Arnot *v.* Pittston Coal Co., 68 N. Y. 558; Materne *v.* Horwitz, 101 N. Y. 469; Spurgeon *v.* McElwein, 6 Ohio, 442; Mordecai *v.* Dawkins, 9 Rich. L. 262; Oliphant *v.* Markham, 79 Tex. 543; Aiken *v.* Blaisdell, 41 Vt. 655; Mound *v.* Barker, 71 Vt. 253; Levy *v.* Davis, 115 Va. 814.

Adams *v.* Coulliard, 102 Mass. 167, 172; Milliken *v.* Pratt, 125 Mass. 374, 376.

Exceptions to the admission of letters of the plaintiffs' agent to them for the purpose of showing what they knew are not argued.

Exceptions overruled.

CHURCH ET AL. *v.* PROCTOR

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, February 2, 1895

[*Reported in* 66 *Federal Reporter*, 240]

IN error to the Circuit Court of the United States for the District of Rhode Island.

This was an action by Joseph O. Proctor, Jr., against Daniel T. Church and others, to recover damages for breach of a contract. On the trial in the circuit court, the jury gave a verdict for the plaintiff. Defendants bring error.

William G. Roelker, for plaintiffs in error.

William A. Pew, Jr., Thomas A. Jenckes, Charles A. Wilson, for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and ALDRICH, District Judges.

ALDRICH, District Judge.[1] At the time the parties entered into the contract involved in this controversy, Proctor, the plaintiff below, was engaged in a general fishing business at Gloucester, in the State of Massachusetts, and in preparing and placing on the general market different kinds of fish, and especially in splitting and slivering a fish called "menhaden," and placing the same upon the market; and the defendants, at Tiverton, in the State of Rhode Island, were engaged in the business of catching and supplying menhaden. [By the terms of the contract the defendants agreed to sell, and the plaintiff to buy, such quantities of menhaden as should be reasonably required by the plaintiff's business, in no event, however, in excess of the defendants' catch.]

It is said by Church & Co. that, looking further to the subject-matter as disclosed by the record, the contract is altogether void, for the reason that it is against public policy. The ground of this objection, stated generally, is that Proctor, taking advantage of the scarcity of mackerel in 1888, conceived the idea of putting upon the markets generally the menhaden, as a food fish, split and salted, packed in barrels, tubs, pails, and other packages, and variously branded with misleading and deceptive marks, and characters, as, for instance "Alaska Mackerel, for Family Use." Proceeding upon

[1] A portion of the opinion, relating to the construction of the ontract, is omitted.

the theory that the facts, if shown, would disclose a contract which would not be upheld, Church & Co. offered evidence to show the character of the marks and brands placed upon the casks and barrels containing the fish, and upon Proctor's objection, this evidence was excluded subject to exception. At the conclusion of all the evidence in the case, the defendants moved for a verdict "on the ground that it appeared from the plaintiff's testimony that the purpose for which he intended to use and did use the fish which were the subject matter of the contract sued upon was illegal, and against public policy, as being a fraud and an imposition on the public, and . . . illegal, in being in violation of chapter 114 of the public statutes of Rhode Island." The court below refused to direct the verdict, and the defendants excepted.

The record does not clearly show that Proctor's deceptive and unwarrantable purpose existed during the entire period covered by the contract, and for this reason the court below could not have properly directed a verdict upon the ground stated in the motion. We think, however, that Church & Co., under the line of defence disclosed, were entitled to show fully the purpose of Proctor at the time of the contract, the use which he made of the fish furnished and in the manner in which they were placed upon the market, and that the court erred in excluding evidence as to the marks and brands upon the casks and barrels. The evidence excluded was competent and material upon the issue raised by the defence, and would tend to show that the public was being deceived and cheated through false and misleading brands and characters used for the purpose of advancing the sale of a product beyond that which would result from its true merit. The point is made that the Rhode Island statute does not apply, for the reason that the evidence shows that the fish in question were designated as "salted fish," while the statute has reference to "pickled fish." This is a distinction which the trade might make, but which, perhaps, the jury would not be required to make, or which, if made, might have been overcome by the jury in view of the evidence that the fish were put up for the trade in barrels and casks and in closed packages of various forms. All pickled fish in the ordinary fish business are salted, although all salted fish are not pickled. In view of all the evidence, we cannot say that the jury would not have been warranted in finding that the witnesses in using the term "salted fish" intended to describe the fish in question as pickled. The purpose of the evidence, as to the manner of placing the fish upon the market, was a double one, first, to show that a statute of Rhode Island was violated, and, second, to show a scheme which involved a fraud on the consumers of fish as an article of food. As bearing upon the general question whether Proctor's purpose and manner of doing business was such as to render the contract void as against public policy, we think the Rhode Island statute might properly be urged, and that it was material to know whether Proctor's

manner of doing business conformed to the statute, or whether it was in plain violation of a statute intended to protect the public generally against fraud and imposition. Chapter 114 of the Public Statutes of Rhode Island, which was in force in 1888, provides, among other things, that "casks for menhaden and herrings shall be of the capacity to hold twenty-eight gallons," and "every cask before being packed or repacked for exportation shall be first searched, examined, and approved by the packer, and shall, when so packed or repacked for exportation, be branded legibly on one head with the kind of fish it contains and the weight thereof, or the capacity of the cask with the first letter of the Christian and the whole of the surname of the packer, the name of the town, and the words Rhode Island, in letters not less than three-fourths of an inch long, to denote that the same is merchantable and in good order for exportation." It is further provided, through section 8 of the same statute, that "every person who shall offer for sale in or or attempt to export from the State any pickled fish which have not been approved by a sworn packer, or in casks which are not branded as aforesaid, shall forfeit fifty dollars for each offence." It is manifest that this statute regulating the packing of fish in Rhode Island was intended for the protection of the public generally, not Rhode Island consumers alone, but consumers generally. It was to prevent fraud upon the public, and public policy requires that no action shall be sucessfully maintained in favor of those who pack and ship food fish in open violation of the wholesome provisions of this statute. It is conceded that the plaintiff below not only did not conform to the statute, but that the packages were falsely marked. The maxim, "*Ex dolo malo no oritur actio*," fairly and forcibly applies to such a situation. If, upon a jury trial, the fact should be established that the packages prepared and shipped by Proctor were pickled fish within the meaning of the Rhode Island statute, then for such time as he was actually engaged, or had the purpose to engage, in packing and shipping pickled fish, without conforming to the provisions of the statute, he would not be entitled to maintain his action for damages resulting from non-delivery of the subject-matter intended to be used in violation of the statute law. Bank *v.* Owens, 2 Pet. 527, 539; Miller *v.* Ammon, 145 U. S. 421, 12 Sup. Ct. 884; Forster *v.* Taylor, 5 Barn. & Adol. 887; Eaton *v.* Keegan, 114 Mass. 34; Pol. Cont. 322; Curtis *v.* Leavitt, 15 N. Y. 9; Benj. Sales, § 654.

Looking at the transaction aside from the local statute, and independent of the question whether the packages contained pickled or salted fish, the authorities conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract, or aid a party, where the purpose is to cheat and deceive the public generally. We feel bound to recognize the modern public

policy indicated by the various statutes, as sustained by judicial authority, designed for the protection of the public, and which, in the interest of health and fair dealing, undertake to regulate traffic in food products. The point is taken that the purpose of Proctor to place this product (innocent of itself) upon the market in an improper manner was not known to Church & Co. at the time of the alleged breach, and that, therefore, the objection is not open to the defence. This is not an answer. The defence of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, by withholding legal remedy from a party contemplating or practising imposition. It would be a strange rule of law which would extend relief to a *particeps criminis,* and withhold relief from an innocent party who seeks to avail himself of its protection when the imposition is discovered. Cowan *v.* Milbourn, L. R. 2 Exch. 230; Spotswood *v.* Barrow, 5 Exch. 110; Holman *v.* Johnson, Cowp. 341. The wholesome and salutary maxim, *"Ex turpi causa non oritur actio,"* has been so far enlarged that it may now be said that the law will not afford a remedy to a wrongdoer in a scheme to deceive and defraud the public, and this modern doctrine does not depend upon the consideration, or the innocence, or lack of innocence, of the party who seeks to interpose the objection. It becomes a defence, and may be interposed whenever the fraud is discovered. It must be observed, however, that it would not always be enough to avoid a contract for a sale of articles innocent of themselves that the party who acquired them, or sought to acquire them, occasionally used them unlawfully. In order that this doctrine should operate in avoidance of a contract, except where the illegality involves life, or offences of the higher grade, it must appear that the party acquiring the product intended to use it unlawfully when the contract was made, or when possession was sought, or that he was engaged in a general scheme involving illegality, or the general purpose was to use the product in a deceptive and fraudulent manner. The record shows that the "plaintiff testified that under the arrangement contemplated by him, and the contract made with the defendants, the fish were to be landed at Still's Wharf, at Tiverton, in the State of Rhode Island, and immediately there split and salted, and packed up in barrels, tubs, pails, and other packages, and marked and branded and shipped to fill these orders to various parts of the country, and that all the fish were actually received by him under this contract with the defendants, and otherwise during the season of 1888, at Tiverton, R. I., were so packed and marked there on the spot," and shipped from that point. It also shows that the barrels, casks, and packages were variously branded "Alaska Mackerel," "Russian Mackerel," "California Mackerel," "Family White Fish," and "Fat Family Silversides." It is obvious that the real object of marking the packages thus was to make the product "appear to be what it was not, and thus induce unwary purchasers."—Plumley *v.* Massachusetts, 155 U. S. 461, Sup.

Ct. 154,—who could not scrutinize the contents, to buy it as mackerel.

Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and law is administered, for the protection of the people; and justice influenced by enlightened public policy, and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of the wrongdoer, where the subject-matter therefor is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading, and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not. Looking at the record as a whole, however, it does not clearly and distinctly appear when the plaintiff below entered upon such scheme or business, and for this reason we cannot say there was error in the refusal of the court to direct a verdict for the defendants. If upon any subsequent trial this issue should be raised, and evidence adduced in support thereof, we think that the jury should be instructed that no damages can be recovered, and no action maintained, covering any period in which the plaintiff below contemplated, or was actually engaged in placing upon the market the fish described in the contract, under false, deceptive and misleading brands, designed to attract and induce trade. During the time he entertained such purpose (Cowan *v.* Milbourn, L. R. 2 Exch. 230, 236; Materne *v.* Horwitz, N. Y. 469, 5 N. E. 331), or was actually engaged in such business, the law will not help him. The verdict should be set aside for the reasons stated, and it becomes unnecessary to consider the other questions raised by the plaintiffs in error.

Judgment of the circuit court reversed; new trial ordered.

SCOTT *v.* BROWN, DOERING, McNAB, & CO.
SLAUGHTER & MAY *v.* BROWN, DOERING, McNAB, & CO.

In the Court of Appeal, July 16, 18, August 1, 1892

[*Reported in* [1892] *Queen's Bench,* 724]

A. L. Smith, L. J.[1] The plaintiff Scott applies to this court to set aside a nonsuit which passed against him at the Guildhall. He asserts that there was evidence to go to the jury of his cause of action, which was for the return of £632 3*s.* 5*d.*, paid to the defendants under contract to purchase shares in a company, upon the ground amongst others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market. The plaintiff and the defendant McNab were jointly

[1] Lindley, L. J., and Lopes, L. J., delivered concurring opinions.

interested with others in bringing out this company and the £632 3*s.* 5*d.* sought to be recovered was paid in pursuance of an agreement that McNab should therewith purchase five hundred shares of the projected company, when brought out, at a premium (at the time of the agreement there was neither company nor market, the sole object of such purchase being that the public might thereby be induced to believe that there was a real market for the shares, and that they were at a real premium, whereas, as the plaintiff and the defendant McNab well knew, they were not. Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction.

If two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law. It has been held that it is a criminal conspiracy for two or more to agree by false rumors to endeavor to raise the price of the public funds on a particular day. Rex *v.* Berenger, 3 M. & S. 67. It has also been held, in Reg. *v.* Aspinall, 1 Q. B. D. 730, 2 Q. B. D. 48, that an agreement by two or more to cheat and defraud by means of false pretences those who might buy shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences. See Reg. *v.* Hudson, Bell, C. C. 263. Lopes, L. J., has gone fully into the correspondence; but the telegram and letter of December 6, 1890, from the defendant McNab to the plaintiff, the letter of December 7, 1890, from the plaintiff to Slaughter, and of December 8, 1890, from Slaughter to McNab, in my judgment, are sufficient. These documents contain conclusive proof that the plaintiff and McNab agreed together to cheat and defraud those who might buy shares in the company by leading them to believe that the shares were at a genuine premium in the market, whereas to their knowledge they were not, the fictitious premium being sought to be brought about by means of the purchases to be made with the plaintiff's £632 3*s.* 5*d.* by McNab, and which were to be made for the sole purpose of creating such fictitious premium. These documents were read by the plaintiff's counsel when he opened the case, as showing the purposes for which the plaintiff and the defendant McNab had agreed that the purchases should be made. The agreement between two or more to do an illegal act has been proved.

The next question is, Was it shown that the plaintiff and McNab agreed to carry out this intention by illegal means,—viz., by deceit and fraud? For, if so, there can be no possible doubt that an indictable conspiracy has been committed,—viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. It is said for the plaintiff that there was nothing deceit-

ful or fraudulent in the fact of his paying his £632 3*s.* 5*d.* to McNab to purchase shares with upon the open market, and if that had been all, I agree; but the question is, Was the payment made as it was for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer,—a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company? I am of the opinion that it was?

Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff of McNab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent representation? I say that he could, and this is another way of stating the same proposition,—viz., that the plaintiff and McNab agreed by means of deceit and fraud to cheat and defraud the would-be purchaser of shares. The agreement to do an illegal act by illegal means is proved, and for the reasons above both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud.

Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action. This was decided in Taylor *v.* Chester, L. R. 4 Q. B. 309, where the illegality was pleaded, and also in Begbie *v.* Phosphate Sewage Co., Law Rep. 10 Q. B. 491, where it was not pleaded, but, the fraud being apparent, the court would not interfere. When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants,—viz., to "keep up the price of shares," which upon the evidence was shown to be to "create a fictitious premium."

In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion, the maxim "In pari delicto potior est conditio possidentis" applies, and this court ought not to assist the plaintiff when he seeks to recover the £632 3*s.* 5*d.* back from the defendants. Upon these grounds, and without going further into the case, this appeal must be dismissed, and with costs.[1]

Appeal dismissed.

[1] See also Nickerson *v.* English, 142 Mass. 267.

SIMON KULLMAN ET AL., RESPONDENTS, *v.* JACOB GREENEBAUM ET AL., APPELLANTS

CALIFORNIA SUPREME COURT, December 17, 1891

[*Reported in* 92 *California,* 403]

APPEAL from an order of the Superior Court of the city and county of San Francisco denying a new trial.

The action was brought to recover the sum of eighteen thousand dollars for the conversion by the defendants of mining stocks belonging to the plaintiffs valued at that sum, which the defendants refused to deliver to the plaintiffs upon demand made upon them on the second day of December, 1886. The complaint alleges that thereafter, on the tenth day of December, 1886, they were fraudulently induced to sign a pretended composition of the creditors of the defendants, which was fraudulent and void as to them by reason of secret preferences of other creditors, of which the plaintiffs were ignorant, and which they rescinded upon discovery of the fraudulent preferences. The plaintiffs recovered judgment for the whole amount claimed as the value of the stocks. Further facts are stated in the opinion of the court.

John R. Jarboe, William S. Goodfellow, and *Edward R. Taylor,* for appellants.

Wal. J. Tuska, for respondents.

MCFARLAND, J. The main question in this case is about the validity of a composition deed, by which the respondents and other creditors of appellants agreed to receive *pro rata* the proceeds of the sale of appellant's assets and thereupon to release them from all claims and demands. Respondents contend that said agreement is invalid, because a fraudulent preference was given to certain of the creditors who signed it, and the court below so found. The court found, as facts, that some of the creditors at first refused to sign the agreement, and that, to induce them to sign, "some of the relatives and friends of the defendants did pay such creditors the full amount of their several demands, with the knowledge, but without the direction of the defendants, and not out of the assets of the said defendants, nor under any promise or expectation of repayment, and thereby did make a preference of such creditors, and induced them to sign the said composition; and that such creditors did receive a larger proportion or sum than secured by said agreement; of all of which facts the plaintiffs at the time of signing such composition were ignorant, and upon the discovery thereof notified the defendants," etc.

We think that the ruling of the court below was right, and in line with the current of authorities. The general rule is correctly laid down in Story's Equity Jurisprudence, § 378; and we stated it quite fully in the recent case of O'Brien *v.* Greenebaum, *ante,* p. 104.

It is strenuously argued by counsel for appellants that the principle does not apply here, for the reasons that the payments to the preferred creditors were not made by the debtors or their agents; and particularly that the payments were not made out of the debtor's assets,—that is, out of the actual and disposable property which they then had. It is to be noticed, however, that the appellants knew of these secret payments to preferred creditors; and as the utmost good faith is required in such transactions, the appellants can hardly be said to be innocent of the imposition practised upon respondents. But beyond all that, the rule does not, by any means, rest solely upon the participation of the debtor in the fraud, and the diminution of the actual assets. In a composition agreement each creditor is a party as to each other creditor, as well as to the debtor. "Creditors sign upon the consideration that others sign upon the same terms; and if they are deceived, they are misled into an act to which they might not otherwise have assented." (See Story's Eq. Jur., § 379, and notes.) Solinger *v.* Earle, 82 N. Y., 393, was a case where a brother-in-law (as in the case at bar) had given his note to induce a creditor to sign a composition deed; and in the opinion of the court in that case there is aptly expressed the views which are determinative of the point in question against appellants in the case at bar. The court says: "The agreement between the plaintiff and the defendants, to secure to the latter payment of a part of their debt in excess of the ratable portion payable under the composition, was a fraud upon other creditors. The fact that the agreement to pay such excess was not made by the debtor, but a third person, does not divest the transaction of its fraudulent character. A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principles of equity and the mutual confidence as between creditors upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction." [1]

Judgment and order affirmed.

De Haven, J., and Sharpstein, J., concurred.

[1] The remainder of the opinion, relating to another point, is omitted.

Ex parte Milner, 15 Q. B. D. 605; Bank of Commerce *v.* Hoeber, 88 Mo. 37; Solinger *v.* Earle, 82 N. Y. 393, *acc.* See also Coleman *v.* Waller, 3 Y. & J. 212; Knight

N. G. GIBBS AND ANOTHER *v.* L. C. SMITH

SUPREME JUDICIAL COURT OF MASSACHUSETTS, September 21–26, 1874

[*Reported in* 115 *Massachusetts,* 592]

CONTRACT to recover for the breach of the following written agreement signed by the parties thereto: "An agreement made this day between N. G. Gibbs, S. A. Cornell, L. C. Smith, and J. C. Kingsley, that the said Gibbs and Cornell will not bid or influenec any one to bid, and will not accept the contract of any one else; and further, the said Kingsley agrees to pay the said Gibbs and Cornell the sum of five hundred dollars if he gets the contract of the jail for the coming three years; and further, the said Smith agrees to pay said Gibbs and Cornell eight hundred dollars if he accepts the contract of the jail for the next three years and runs it."

At the trial in the Superior Court, before Wilkinson, J., the plaintiffs offered to prove that the agreement related to the letting upon bids advertised for by the overseers of the house of correction of Hampden County, for the services and labor for three years, of the inmates of the house of correction of the county; that they fully performed their agreement, and that the defendant accepted the contract of the jail as specified in the agreement and runs it, and although requested by plaintiffs to pay them the sum of eight hundred dollars, according to the terms of the said agreement, refuses so to do; that the plaintiffs, by reason of favoritism, would not have obtained the contract if they had made bids therefor; and that the county was, therefore, in no manner injured by the agreement of said parties.

Upon these offers the presiding judge ruled that the plaintiffs could not maintain their action, on the ground that the agreement was against public policy and void, and directed a verdict for the defendant, and the plaintiffs alleged exceptions.

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v. Hunt, 5 Bing. 432; Brown *v.* Nealley, 161 Mass. 1. Compare Continental Nat. Bank *v.* McGeoch, 92 Wis. 286. If the debtor is ignorant of the advantage given by a third person to one creditor, other creditors cannot avoid the composition. Martin *v.* Adams, 81 Hun. 9. See also *Ex parte* Milner, 15 Q. B. D. 605; Bank of Commerce *v.* Hoeber, 88 Mo. 37, 44.

On the ground that the debtor is presumed to act under compulsion and is, therefore, not *in pari delicto*, it has been held that money paid by a debtor to secure a creditor's assent to a composition may be recovered by the debtor. Atkinson *v.* Denby, 6 H. & N. 778; 7 H. & N. 934; Bean *v.* Brookmire, 2 Dill. 108; Bean *v.* Amsink, 10 Blatchf. 361; Brown *v.* Everett, &c. Co., 111 Ga. 404; Crossley *v.* Moore, 40 N. J. L. 27. But see Frost *v.* Gage, 3 Allen, 560; Solinger *v.* Earle, 82 N. Y. 393. If, however, the debtor makes the payment after the composition has been made, though in compliance with a promise made as an inducement thereto, the payment is voluntary and cannot be recovered. Wilson *v.* Ray, 10 A. & E. 82; Batchelder & Lincoln Co. *v.* Whitmore, 122 Fed. 355 (C. C. A.).

If the creditor bargains for an improper advantage as consideration for entering into a composition, it has been held in England to preclude any recovery on his claim, the release in the composition binding him, though he is unable to enforce the debtor's promise to pay either the regular composition or the illicit advantage. Mallalieu *v.* Hodgson, 16 Q. B. 689; Mayhew *v.* Boyes, 103 L. T. (N. S.) 1. But see *contra* Batchelder & Lincoln Co. *v.* Whitmore, 122 Fed. Rep. 355 (C. C. A.); Hanover Nat. Bank *v.* Blake, 142 N. Y. 404.

E. B. Gillett and *H. B. Stevens,* for the plaintiffs.

G. M. Stearns and *M. P. Knowlton,* for the defendant.

DEVENS, J. An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction which they desire to purchase together, either because they propose to hold it together, or afterwards divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced;[1] but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it, and therefore illegal.[2] Phippen *v.* Stickney, 3 Met. 384, 387; 1 Story Eq. Jur. § 293; Story Sales, § 484.

The contract in the present case is manifestly of the latter class. The labor of the inmates of the house of correction was to be sold at auction. The plaintiffs contracted with the defendant not to bid for it if the defendant would pay them a certain sum if he obtained it. The only consideration for the defendant's promise was that the plaintiffs should abstain from the bidding. Competition would thus

[1] Kearney *v.* Taylor, 15 How. 494, 519; Jenkins *v.* Fink, 30 Cal. 586; Switzer *v.* Skiles, 8 Ill. 529; Hunt *v.* Elliott, 80 Ind. 245; Smith *v.* Ullman, 58 Md. 183; Phippen *v.* Stickney, 3 Met. 384; Stillwell *v.* Glasscock, 91 Mo. 658; Murphy *v.* De France, 105 Mo. 53; Whalen *v.* Brennan, 34 Neb. 129; Gulick *v.* Webb, 41 Neb. 706; Olson *v.* Lamb, 56 Neb. 104; Bellows *v.* Russell, 20 N. H. 427; Huntington *v.* Bardwell, 46 N. H. 492; National Bank *v.* Sprague, 20 N. J. Eq. 159, 168; De Baun *v.* Brand, 61 N. J. L. 624; Marsh *v.* Russell, 66 N. Y. 228; Marie *v.* Garrison, 83 N. Y. 14; Smith *v.* Greenlee, 2 Dev. L. 126; Goode *v.* Hawkins, 2 Dev. Eq. 393; Breslin *v.* Brown, 24 Ohio St. 565; Smull *v.* Jones, 6 W. & S. 122; Maffet *v.* Ijams, 103 Pa. 266; McMinn's Legatees *v.* Phipps, 3 Sneed, 196; James *v.* Fulcord, 5 Tex. 512; Flanders *v.* Wood, 83 Tex. 277; Dailey *v.* Hollis, 27 Tex. Civ. App. 570; Barnes *v.* Morrison, 97 Va. 372, *acc.* Compare Woodruff *v.* Berry, 40 Ark. 251; Marshalltown Stone Co. *v.* Des Moines Brick Co., 114 Iowa, 574.

[2] Hyer *v.* Richmond Traction Co., 80 Fed. Rep. (C. C. A.) 839, 168 U. S. 471; McMullen *v.* Hoffman, 174 U. S. 639; Atlas Nat. Bank *v.* Holm, 71 Fed. Rep. 489, Swan *v.* Chorpenning, 20 Cal. 182; Ray *v.* Mackin, 100 Ill. 246; Devine *v.* Harkness; 117 Ill. 145; Conway *v.* Garden City Co., 190 Ill. 89; Hunter *v.* Pfeiffer, 108 Ind. 197; Clark *v.* Stanhope, 109 Ky. 521; Gardiner *v.* Morse, 25 Me. 140; Weld *v.* Lancaster, 56 Me. 453; Hanna *v.* Fife, 27 Mich. 172; Boyle *v.* Adams, 50 Minn. 255; Wooton *v.* Hinkle, 20 Mo. 290; Miltenberger *v.* Morrison, 39 Mo. 71; Goble *v.* O'Connor, 43 Neb. 49; McClelland *v.* Citizens' Bank, 60 Neb. 90; Gulick *v.* Ward, 5 Halst. 87; Brooks *v.* Cooper, 50 N. J. Eq. 761; Kenny *v.* Lembeck, 53 N. J. Eq. 20; Jones *v.* Caswell, 3 Johns. Cas. 29; Doolin *v.* Ward, 6 Johns. 194; Wilbur *v.* How, 8 Johns. 444; Thompson *v.* Davies, 13 Johns. 112; People *v.* Stephens, 71 N. Y. 527; Hopkins *v.* Ensign, 122 N. Y. 144; Baird *v.* Sheehan, 166 N. Y. 631; Coverly *v.* Terminal Warehouse Co., 81 N. Y. Supp. (App. Div.) 369; Ingram *v.* Ingram, 4 Jones L. 188; King *v.* Winants, 71 N. C. 469; Kine *v.* Turner, 27 Oreg. 356; Saxton *v.* Seiberling, 48 Ohio St. 554, 562; Barton *v.* Benson, 126 Pa. 431; Hay's Estate, 159 Pa. 381; Dudley *v.* Odom, 5 S. C. 131; Wilson *v.* Wall, 99 Va. 353, 356; Ralphsnyder *v.* Shaw, 45 W. Va. 680, *acc.* See also Fenner *v.* Tucker, 6 R. I. 551; Herndon *v.* Gibson, 38 S. C. 357; 20 L. R. A. 545, *n.* Compare Breslin *v.* Brown, 24 Ohio St. 565. The English authorities, especially in equity, seem to permit greater freedom of combination to affect the price than the American. Galton *v.* Emuss, 1 Coll. Ch. 243; *Re* Carew's Estate, 26 Beav. 187; Heffer *v.* Martyn, 36 L. J. Ch. 372; Chattock *v.* Muller, 8 Ch. D. 177. Compare Levi *v.* Levi, 6 C. & P. 239; Rawlings *v.* General Trading Co., [1920] 3 K. B. 30, commented on in 36 L. Qu. Rev. 331.

be destroyed so far as these parties were concerned, and the labor might thus be obtained at a rate lower than its fair market value. The contract thus being made against public policy, no action can be maintained upon it by the parties thereto. Fuller *v.* Dame, 18 Pick. 472; Rice *v.* Wood, 113 Mass. 133.

Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose which they must have contemplated when it was made; its validity is tested not by its results, but by its objects as shown by the terms.

Exceptions overruled.

C. F. JEWETT PUBLISHING COMPANY *v.* BUTLER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 19, 1893

[*Reported in* 159 *Massachusetts,* 517]

THIS was an action to recover for breach of an agreement to allow the plaintiff corporation to publish "Butler's Book." In the Supreme Judicial Court, Holmes, J., found that if the contract relied on by the plaintiff was valid, the plaintiff was entitled to recover $2,500 with interest, and reported the case to the full court. The material facts are in the opinion.[1]

E. C. Bumpus, S. J. Elder, and *W. C. Wait,* for the plaintiff.

J. Lowell and *E. M. Johnson,* for the defendant.

MORTON, J. The first question is whether the contract is, as the defendant contends, illegal on its face. The words relied on to show that it is are as follows: "The party of the first part agrees to accept full responsibility of all matter contained in such work, and to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work, and to pay all costs and damages arising from said suits." The presiding justice found that "the contract was made without illegal intent, unless and except so far as the words used import one as matter of law." Do the words used as quoted above import one as matter of law? We think not. The parties were contracting respecting a book which was not in existence, but was to be written. There was nothing in the character of the proposed work which naturally or necessarily involved the publication of scandalous or libellous matter, as was the case, for instance, in Shackell *v.* Rosier, 2 Bing. N. C. 634, referred to by the defendant. At the same time it was not impossible that in spite of due care and good faith on the part of the author and publisher, the proposed book might contain matter which others perhaps would deem libellous. In such case it would be no more unlawful for the

[1] The statement of the case is abbreviated.

parties to provide that the author should save the publisher harmless from all costs and damages to which he might be subjected by reason of the publication of the book, than it would be for a patentee to agree with his licensee that he would protect him against all costs and damages to which he might be subjected in consequence of using the patent to which the license applied. The case stands on grounds entirely different from those on which it would stand if it appeared that the parties intended to publish or contemplated the publication of libellous matter. There is nothing in the agreement fairly to show that such was their purpose. The most that can be said is that though there was no intention to write or publish, nor any contemplation of writing or publishing libellous matter on the part of the author or publisher, it might turn out after the book was published that it did contain libellous matter. But that is very far from saying that the parties had in view an illegal purpose in publishing the book. We see nothing unlawful in a contract which provides, without anything more, that the author shall indemnify the publisher for costs and damages to which he may be subjected by reason of the publication of a book to be written by the author.

Moreover, it was possible in this case that the book might not contain libellous matter, although libel suits against the publisher might grow out of it. It would be hard to say in such event that the publisher who might have published the book without any libellous purpose, and in the full belief that it contained nothing libellous, could not recover of the author under this clause in the contract the costs and damages to which he had been put by such suits. In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libellous matter; or that the author proposed, with the knowledge and acquiescence of the publisher, to write libellous matter, or that the contract on its face provided for or promoted an illegal act. We do not think the clause in question is fairly susceptible of either construction. Fletcher *v.* Harot, 55; s.c. *sub nom* Battersey's case. Winch. 48; Betts *v.* Gibbons, 2 A. & E. 57; Adamson *v.* Jarvis, 4 Bing. 66; Waugh *v.* Morris, L. R. 8 Q. B. 202; Pearce *v.* Brooks, L. R. 1 Ex. 213; Cannan *v.* Bryce, 3 B. & Ald. 179; Graves *v.* Johnson, 156 Mass. 211.

The defendant contends, in the next place, that he was justified in his refusal to go on with the contract, because of his doubts as to the solvency of the plaintiff corporation, and because of the disgrace attached to its name in consequence of the conduct of Jewett.

The first ground thus taken would seem to be disposed of by the recent case of Hobbs *v.* Columbia Falls Brick Co., 157 Mass. 109, and need not, therefore, be further considered.

As to the second ground, it is to be observed that the contract was not made with Jewett personally, but with the corporation which bore his name. Moreover, Jewett had fled, and it fairly may be presumed

that his place as president and manager has been filled by the election of another person, so that the defendant cannot and will not be obliged to come into further association with him. It is well known that corporations are frequently organized which bear as part of their corporate name the name of some individual. The contention of the defendant would require us to hold that in all such cases a party making a contract with such a corporation would be justified in refusing to go on with it, if the person whose name the corporation bore committed an act rendering him liable to punishment as a criminal, or bringing him into disgrace and rendering further association with him unprofitable and injurious to the other party to the contract. But a corporation does not, in such a case, impliedly guarantee, as an element of the contract entered into with it, that the person whose name it bears shall continue to be a reputable member of society. The corporation is distinct from the person whose name it bears. Its interests and those of its stockholders in contracts made by it with other parties, are not to be affected by the disgraceful or criminal conduct of the person whose name it bears, and for which it is in no way responsible. A majority of the court think the entry should be, judgment for plaintiff for $2,500, and interest from June 9, 1890, and it is *So ordered.*

Lathrop, J. I am unable to concur in the opinion of the majority of the court, that the contract sought to be enforced is a valid contract. The contract provides for the publication of a work to contain the author's autobiography, "or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs." It is in reference to a work of this character that the defendant agrees to do three things: First "to accept full responsibility of all matters contained in said work." Secondly, "to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work." Thirdly, "to pay all costs and damages arising from such suits." The obligation of the defendant is not limited to paying legal expenses, but includes costs and damages recovered against the publisher "for publishing any statement contained in said work." While it is found that the parties acted without illegal intent, yet if the legal effect of the language used is to make the contract against the policy of the law, this court ought not to enforce it. It seems to me to be impossible to say that the language used applies only to groundless suits, and that it should be so construed. What the parties contemplated, and what they intended to provide for, was that actions might be brought against the publisher for libellous matter contained in the work; that these actions might be successfully maintained against the publisher, who would then be compelled to pay damages and costs. In this event the writer agreed to indemnify the publisher. Could such an agreement have been enforced? In my opinion it could not, and this

view is sustained by the authorities. Shackell *v.* Rosier, 2 Bing N. C. 634; Colburn *v.* Patmore, 1 C. M. & R. 73; Gale *v.* Leckie, 2 Stark. 107; Clay *v.* Yates, 1 H. & N. 73; Arnold *v.* Clifford, 2 Sumn. 238;[1] Odgers Libel and Slander, 2d ed. 8. See also Bradlaugh *v.* Newdegate, 11 Q. B. D. 1, 12; Babcock *v.* Terry, 97 Mass. 482. It follows that the whole contract was tainted with illegality, and neither party was bound to go on with it. Robinson *v.* Green, 3 Met. 159, 161; Perkins *v.* Cummings, 2 Gray, 258; Woodruff *v.* Wentworth, 133 Mass. 309; Bishop *v.* Palmer, 146 Mass. 469; Lound *v.* Grimwade, 39 Ch. D. 605, 613.[2]

J. N. TILLOCK *v.* JOHN WEBB

SUPREME JUDICIAL COURT OF MAINE, 1868

[*Reported in* 56 *Maine*, 100]

ON exceptions to the ruling of Goddard, J., in the Superior Court.

ASSUMPSIT on a note for $48, given by the defendant to the plaintiff, dated April 13, 1867. Plea, general issue, with brief statement denying any consideration, and also alleging that the consideration was an unlawful one.

The case was tried by the judge (without the intervention of a jury), whose decision was subject to exceptions in matters of law.

The judge found, as matter of fact, that the defendant, at Bucksport, at half-past four o'clock on one Sunday afternoon in July, 1865, hired a horse and carriage of the plaintiff, who was a stable-keeper, and took from the house where the defendant was living, two young ladies, one of whom had come from church about an hour previous, whither she had walked that day from her home, two or three miles

[1] Lea *v.* Collins, 4 Sneed, 393; Atkins *v.* Johnson, 43 Vt. 78, *acc.*

[2] A promise to indemnify one from the consequences of doing an act which is necessarily illegal is unenforceable. Williston, Contracts, § 1751. But where the legality of the act depends on extrinsic facts unknown to the promisee, enforcement of a promise to indemnify him from the consequences of doing the act is not opposed to public policy. Arundel *v.* Gardiner, Cro. Jac. 652; Fletcher *v.* Harcott, Winch, 48; Merriweather *v.* Nixon, 8 T. R. 186; Betts *v.* Gibbons, 2 A. & E. 57; Elliston *v.* Berryman, 15 Q. B. 205; Moore *v.* Appleton, 26 Ala. 633; Stark *v.* Raney, 18 Cal. 622; Lerch *v.* Gallup, 67 Cal. 595; Marcy *v.* Crawford, 16 Conn. 549; Higgins *v.* Russo, 72 Conn. 238; Wolfe *v.* McClure, 79 Ill. 564; Marsh *v.* Gold, 2 Pick. 284; Train *v.* Gold, 5 Pick. 379; Avery *v.* Halsey, 14 Pick. 174; Shotwell *v.* Hamblin, 23 Miss. 156; Foriquet *v.* Tegarden, 24 Miss. 96; Moore *v.* Allen, 25 Miss. 363; McCartney *v.* Shepard, 21 Mo. 573; Harrington's Adm. *v.* Crawford, 136 Mo. 467, 472; Allaire *v.* Onland, 2 Johns. Cas. 54; Coventry *v.* Barton, 17 Johns. 142; Trustees *v.* Galatian, 4 Cow. 346; Chamberlain *v.* Beller, 18 N. Y. 115; Ives *v.* Jones, 3 Ired. 538; Miller *v.* Rhodes, 20 Ohio St. 494; Mays *v.* Joseph, 34 Ohio St. 22; Comm. *v.* Vandyke, 57 Pa. 34; Jamison *v.* Calhoun, 2 Speer, 19; Davis *v.* Arledge, 3 Hill, 170; Hunter *v.* Agee, 5 Humph. 57; Ballard *v.* Pope, 3 U. C. Q. B. 317; Robertson *v.* Broadfoot, 11 U. C. Q. B. 407. See also Vandiver *v.* Pollak, 97 Ala. 467, 107 Ala. 547; Union Stave Co. *v.* Smith, 116 Ala. 416; Griffiths *v.* Hardenbergh, 41 N. Y. 464.

A contract to indemnify a surety on a bail bond is illegal in England, Consolidated Finance Co. *v.* Messgrave [1900] 1 Ch. 37, but generally permitted in the United States. 3 Williston, Contracts, § 1717.

distant; that he drove about one half a mile beyond her house, and while in the act of turning the horse and carriage for the purpose of going back to leave her at her house, upset and badly injured the buggy, and frightened and more or less thereby injured the horse for stable use; that, after tying together the broken buggy, the defendant undertook to lead the horse back, but the horse got away from him and ran home with the buggy; that the plaintiff had the carriage repaired at an expense of $60; that the defendant paid the plaintiff $30, and gave the note in suit for the balance of damages claimed.

The judge ruled that the facts disclosed a sufficient consideration for the note, and that the consideration was lawful. To which ruling the defendant alleged exceptions.

Thos. B. Reed, for the plaintiff.

J. O'Donnell, for the defendant.

APPLETON, C. J. The defendant hired of the plaintiff and his partner a horse and wagon to ride on Sunday. The hiring was not for any purpose of necessity or charity. Being illegal between the the parties, it is not made legal because the hirer did a kind act by conveying a young lady home, who had been "to meeting" during the day. The contract, so far as disclosed, was indefinite as to time, distance and use, and not being for any purpose of necessity or charity, was one which the law will not enforce, nor will it give compensation for its violation. Way *v.* Foster, 1 Allen, 408; Morton *v.* Gloster, 46 Maine, 520.

If the defendant injured the horse and wagon by his careless or negligent driving, the remedy for the bailors would be against him for breach of his duty as bailee,— that is, for a breach of the duties arising from and under the contract of bailment. But, as that contract was against the provisions of the statute, no action could have been maintained upon it.

The only consideration for the note is the liability of the defendant under a contract prohibited by law. But this cannot be regarded as a legal consideration. The rights of the parties remain as if no note had been given. The original contract, being void, was not susceptible of ratification. Day *v.* McAllister, 15 Gray, 433.

In Morton *v.* Gloster, 46 Maine, 520, and in Woodman *v.* Hubbard, 5 Poster, 520, the bailee was guilty of a conversion of the property bailed, and was held liable therefor in trover. Not so here. The defendant is not proved to have kept the horse and wagon longer or to have driven further than he agreed to. He is not shown to have been guilty of any act of conversion. *Exceptions sustained.*

KENT, WALTON, DICKERSON, and DANFORTH, JJ., concurred.[1]

[1] On the effect of transactions on Sunday, see Harris, Sunday Laws; Ringgold, Law of Sunday; Greenhood on Public Policy, 546 *et seq.;* 3 Williston, Contracts, § 1700, *et seq.*

GEORGE W. STEWART *v.* CHARLES H. THAYER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 2–30, 1898

[*Reported in* 170 *Massachusetts,* 560]

HOLMES, J. This is an action upon an account annexed, for music furnished to the defendant by the plaintiff. The case already has been before this court after a trial on the first count. Stewart *v.* Thayer, 168 Mass. 519. It has been decided that the contract testified to by the plaintiff was entire, and is not to be enforced because a part of the services which it called for were to be rendered on Sunday, and were within the prohibition of Pub. Sts. c. 98, §§ 1, 2. We assume this to be settled, and shall discuss it no further.[1]

When the case came on for trial a second time, the plaintiff was allowed to amend his declaration by adding a second count, like the first on an account annexed, but intended seemingly, by some changes of dates, etc., to avoid showing that any of the services rendered were on Sunday, the contract under which they were rendered not being mentioned, of course. It was objected on behalf of the sureties on a bond given to dissolve the attachment in this suit that the amendment was not for the same cause of action, but the amendment was allowed and the sureties excepted.

We assume that the sureties have a *locus standi* to except, even if their rights would be protected sufficiently by leaving it open to them to deny the cause of action was the same when sued upon their bond. Pub. Sts. c. 167, § 85. Kellogg, *r.* Kimball, 142 Mass. 124, 128, 129. But we think it needs no argument or express evidence to show that the new count is for the same cause of action as the old, within the requirements of Pub. Sts. c. § § 42, 85. Mann *v.* Brewer, 7 Allen, 202. They both claim the same sum for services during the same months of the year, and for services shown to have to do with music, in the first count by the words "orchestra and music boxes," in the second by the words "leader and music boxes." Even if the finding had not been warranted when the amendment was allowed, it was shown to be correct as soon as the plaintiff offered his evidence. This exception is overruled.

When it came to the evidence, the plaintiff proposed to prove that he rendered the services declared for on secular days, but admitted that on cross-examination his testimony would be the same as at the former trial, which means that it would show the services to have been

[1] It appears from the report in 168 Mass. 519, that the defendant, proprietor of a seaside resort, contracted in 1893 with the plaintiff, leader of a band, for the services of the band during July and August at certain prices for each week of seven days. The plaintiff and the band played during the agreed time. On Sundays there were concerts in the afternoon and evening.

Subsequent to 1893, some additions were made by statute in Massachusetts to the amusements or matters of business which might lawfully be done on Sunday. See Rev. Laws, c. 98; Acts of 1918, c. 257; Acts of 1920, c. 240.

rendered under a contract which, as we have said, already has been passed upon by this court. Thereupon the court ruled that the action could not be maintained, and the plaintiff excepted.

It was suggested that the defendant was not entitled to bring out what the real contract was, and that it would be taking advantage of his own unlawful act. But when the plaintiff tried to establish a certain contract, namely, a promise expressed by conduct to pay a fair and reasonable price for services rendered on week days, the defendant had a right to show that he did make that contract, and he might prove it as well by showing that he made a different contract as by showing that he made none. Phipps *v.* Mahon, 141 Mass, 471, 473; Starratt *v.* Mullen, 148 Mass. 570. For this negative purpose it does not matter whether the contract actually made was valid or not. See Starrett *v.* Mullen, 148 Mass. 570; New York & New England Railroad *v.* Sanders, 134 Mass. 53, 55.

It will be noticed that this contract was bad, not because of the time when it was made, but because of its contents. Unless the original contract has been split up, of which there was no pretence, there could be no question of fact whether a valid contract was not made at a later time, such as sometimes has arisen under the Sunday law. Under such circumstances, however illegality should be dealt with, it should be dealt with on evidence of the facts as they were. It would be inelegant, if not worse, to allow the jury to find that the defendant made an actual contract different from that which he really made, by confining them to evidence of only a part of the facts and excluding the rest.[1]

If the plaintiff were to be allowed to recover, the ground would be that, if the defendant saw fit to repudiate the contract actually made, the law would make him pay the reasonable value of the services lawfully rendered and accepted, and that therefore, under the forms of action in use, he would be liable on a fictitious contract implied by law. Such would be the law of this State if the only trouble with the contract was the statute of frauds. Bacon *v.* Parker, 137 Mass. 309, 311. See Clark *v.* United States, 95 U. S. 539, 542, 546. But such is not the law when the contract is unlawful, and the parties making it stood on an equal footing. The plaintiff, having rendered his services in pursuance of an illegal scheme, is not in a position to ask the law to help him by substituting a fiction for a fact. His inability to recover depends upon different reasons from the inability to recover upon a harmless or laudable contract not evidenced by writing. It may be

[1] In Collins *v.* Blantern, 2 Wilson, 341, 1 Sm. L. C. (10th ed.) 355 (9th Am. ed.), 646, it was decided that even in an action upon a specialty, valid upon its face, facts might be pleaded and proved showing that the specialty was given as part of an illegal transaction. This has been regarded as settled law since that time. See Greenhood on Public Policy, 113 *et seq.* and cases cited. Indeed, if illegality is of a serious character a court will of its own motion take notice of it and will not allow the defence to be waived. Metz Co. *v.* Boston & Maine R., 227 Mass. 307. While if the illegality is technical or trivial advantage can be taken of it only if pleaded. 3 Williston, Contracts, § 1630a.

regarded as a punishment which he is not to be allowed to evade simply by changing the form of his count. It is true that the defendant is as bad as the plaintiff but he is no worse. It would be treating him as worse if he were compelled to pay according to a fiction because the plaintiff would not be allowed to recover according to the fact. Defendants are not estopped to show that the transactions on which they are sought to be held were illegal, in favor of the plaintiffs who cannot invoke the estoppel without showing that they were equally in the wrong.

In Bradley *v.* Rea, 102 Mass. 188, language is used which is somewhat opposed to our decision if taken literally, but we doubt if the court intended to decide anything which we are called on to overrule. The earlier decision of Ladd *v.* Rogers, 11 Allen, 209, sustains our view; and in Cranson *v.* Goss, 107 Mass. 439, 441, Gray, J., says: "If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied." See also Dodson *v.* Harris, 10 Ala. 566, 569; Troewert *v.* Decker, 51 Wis. 46; Simpson *v.* Nicholls, 3 M. & W. 240, and 5 M. & W. 702, *n.;* Thompson *v.* Williams, 58 N. H. 248. If this is true as to property received under an illegal contract and kept when it might be returned, *a fortiori* it is true as to services accepted which cannot be returned, See Keener, Quasi-Contracts, 265.

Exceptions overruled.[1]

ALICE NOICE *v.* A. D. BROWN

New Jersey Supreme Court, February Term, 1876

[*Reported in* 38 *New Jersey Law,* 228]

Beasley, C. J. The declaration, to which a demurrer has been filed, complains in all its counts of a breach of a promise of marriage. These counts are special, and all contain the same facts. The case thus presented is, that the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained.

I cannot see the faintest semblance of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done should not be illegal at time of its contemplated performance. Such is not the law. A contract is

[1] See also as to the effect of illegality of part of the consideration for a promise, 3 Williston, Contracts, § 1779 *et seq.*

totally void, if when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship, in order to execute the purpose for which it is established, requires the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by anything which has a tendency to alienate such devotion. But this plaintiff claims the right to take to herself that affection of this husband, which, in legal theory at least, belongs to the wife; but such a transfer the law will not sanction. Such conduct is a gross violation of the rights of the wife. Nor, in a legal point of view, does it at all strengthen the argument to suggest that the defendant, at the time of making this promise, was living separated from his wife, and was looking forward to a divorce. While the marriage exists the duties inherent in such marriage likewise exist, and they cannot be thrown off at the will of either party. By voluntarily withdrawing from the society of his wife a man cannot free himself from his matrimonal obligations. Nor can he do so in the hope of divorce. If a husband can bind himself to a future marriage conditioned on the getting of a divorce, so he can incur a similar obligation to be put in effect on the dissolution of his marriage by the death of his wife. Such contracts are highly impolitic and highly scandalous, and are, therefore, illegal.

The demurrer must be sustained.[1]

[1] The decision was affirmed by the Court of Errors and Appeals, 39 N. J. L. 133. From that report the additional fact appears that the pending proceedings for divorce were instituted by the defendant's wife.

See also Paddock *v.* Robinson, 63 Ill. 99; Leupart *v.* Shields, 60 Pac. Rep. (Col. App.) 193. Compare Brown *v.* Odill, 104 Tenn. 250.

In Graham *v.* Chicago, &c. Ry. Co., 53 Wis. 473, 484, the court said: "The lawfulness of an act done depends upon the laws in force at the time it is done; and, if unlawful when done, it does not become lawful by a subsequent change of the law which renders such act lawful thereafter. Bailey *v.* Mogg, 4 Denio, 60; Roby, *v.* West, 4 N. H. 285; Jaques *v.* Withy, 1 H. Bl. 65; Fletcher *v.* Peck, 6 Cranch, 87; Conley *v.* Palmer, 2 Comst. 182.

"This court has enforced this rule to its full extent in cases of contracts void at the time they were made, under the usury law and the law prohibiting a party from recovering for liquor bills. Gorsuth *v.* Butterfield, 2 Wis. 237; Root *v.* Pinney, 11 Wis. 84; Wood *v.* Lake, 13 Wis. 84; Lee *v.* Peckham, 17 Wis. 383; Morton *v.* Rutherford, 18 Wis. 298; Meiswinkle *v.* Jung. 30 Wis. 361; Austin *v.* Burgess, 36 Wis. 186."

The same doctrine was applied in Fulton *v.* Day, 63 Wis. 112, to the case of a note given after the repeal of the United States Bankruptcy Law of 1867 in renewal of a note made void by that statute.

Compare Hartford Fire Ins. Co. *v.* Chicago, &c. Ry. Co., 62 Fed. Rep. 904; and see 3 Williston, Contracts, § 1683.

GYLES MERRILL *v.* BYRON L. PEASLEE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, November 5, 1887–March 30, 1888

CONTRACT upon a note for $5,000, payable to the plaintiff and made by the defendant's testator.

The testator made the note, and simultaneously the plaintiff executed a declaration of trust, declaring that he would collect the note after the death of the testator, and pay the proceeds to Abby D. Peaslee, the testator's wife, provided she had lived with the testator as his wife until his death.

The evidence further showed that the note was given by the testator in consideration that his wife would return to him and live with him as his wife, and that he should not institute the proceedings for a divorce.[2]

H. H. Carter and *B. B. Jones,* for the plaintiff.

W. H. Moody, for the defendants.

W. ALLEN, J. The note was given to carry out a contract between husband and wife, by which, in consideration that she should live with him as his wife during their joint lives, he was to cause to be paid to her five thousand dollars after his decease, if she survived. The consideration of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband. It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy. Perhaps a husband can hire his wife to do anything for him which a servant can be hired to do, or can buy of her anything that is the subject of barter; but a servant cannot be hired to fulfil the marital relation, and the fellowship of the wife is not an article of trade between husband and wife. Like paternal authority and filial obedience, conjugal *consortium* is without the range of pecuniary considerations. The law fixes and regulates it on public considerations, and will not allow the parties to discard and resume it for money.

It is the same when the misconduct of one party has given to the other the option to withdraw conjugal fellowship. It is not a mere personal right affecting only the parties to the marriage, but a right which is an incident of the status of marriage, and which affects children, the family, and society, and which must be exercised upon considerations arising from the nature of the right. It is given to the injured party to be used in the interests of justice and of society. It is as much against public policy to restore interrupted conjugal relations for money, as it is to continue them without interruption for

[1] The statement of facts has been abbreviated.

the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public, when it is sold for money, and the law cannot recognize such a consideration for it; it implies forgiveness founded on the supposed penitence of the wrong doer and the hope that he will not again offend. The resumption of marital intercourse after a justifiable separation without forgiveness, and only for money, shows connivance rather than condonation. See Copeland *v.* Boaz, 9 Baxter, 223; Van Order *v.* Van Order, 8 Hun, 315; Roberts *v.* Frisby, 38 Tex. 219; Miller *v.* Miller (Iowa), 35 N. W. Rep. 464; Adams *v.* Adams, 91 N. Y. 381; Garth *v.* Earnshaw, 3 Y. & C. 584; Gipps *v.* Hume, 2 Johns. & Hem. 517; Brown *v.* Brine, 1 Ex. D. 5.

In the present case the wife had left her husband, and had a good cause of divorce from him on account of extreme cruelty. But the agreement did not look to a provision for a separate support of the wife, nor did it bar against proceedings by her for a divorce, except as that was involved in the resumption by her of marital relations. Had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion. See Newsome *v.* Newsome, L. R. 2 P. & D. When the wife, who was living separate from her husband for justifiable cause, voluntarily returned to him, the law conclusively presumed that she had returned because she had condoned the offence, and not because she was paid to live with him; and it will not enforce or recognize as valid a promise of the husband to pay money to the wife to induce her to return to him, or to condone the offence. In the opinion of a majority of the court the entry must be, *Exceptions overruled.*

Holmes, J. We must assume, and the majority of the court do assume, that a consideration furnished by a married woman who is a *cestui que trust* will sustain a promise by her husband to her trustee. Whatever might be thought upon this point as a new question, it has been settled, not without discussion, and we are bound by the decisions. Butler *v.* Ives, 139 Mass. 202. See Nichols *v.* Nichols, 136 Mass. 256.

In the case at bar the evidence tended to show that the defendant's testator had been guilty of extreme cruelty to his wife, entitling her to a divorce, and that she had separated from him, and had consulted counsel with a view to obtaining a divorce and alimony. The consideration for the note in suit was, that "she would not proceed against him for a divorce or alimony, and would return to him and live with him as his wife." This consideration, however construed, was fully furnished. She did not proceed against him, and she did return and did live with him as his wife until his death.

I do not understand it to be denied that this conduct on the wife's

part was such a change of position, or detriment in the legal sense of that word, as to be sufficient consideration for a promise, if not an illegal one. We must take it that the wife had a right to refuse to return to cohabitation, and it seems to follow that, apart from illegality, the return itself was sufficient consideration for the note. Burkholder's Appeal, 105 Penn. St. 31, 37. The case is not like those where the wife was only doing what she was legally bound to do. This was the ground of decision in Miller *v.* Miller (Iowa, Dec. 13 1887), 35 N. W. Rep. 464, and, so far as appears, was the fact in Copeland *v.* Boaz, 9 Baxter, 223; Roberts *v.* Frisby, 38 Tex. 219. The last two cases seem to go in part also upon the ground that a contract by a husband upon a consideration moving from the wife is void, notwithstanding the intervention of a trustee, which cannot be taken here in view of the cases first cited.

At all events, the giving up or refraining from proceedings for a divorce and alimony, which the wife is entitled to maintain, is both a sufficient and a legal consideration. Wilson *v.* Wilson, 1 H. L. Cas. 538, 574; s.c. 14 Sim. 405, 5 H. L. Cas. 40; Hart *v.* Hart, 18 Ch. D. 670, 685; Sterling *v.* Sterling, 12 Ga. 201, 204. So that I understand the precise reason on which the decision of the majority goes to be that coupling the wife's return to cohabitation with the legal consideration of giving up her divorce suit made the contract illegal.

I find no decision or dictum in favor of this proposition. On the other hand, the Court of Errors and Appeals of New York has unanimously sustained the validity of a note given by a husband to a trustee for his wife upon substantially the same consideration as in the case at bar, and has declared itself unable to see anything against public policy in the transaction. It seems probable that the Supreme Court of Pennsylvania would decide in the same way, and it is hardly open to doubt that the same view would be taken in England. Adams *v.* Adams, 91 N. Y. 381; Burkholder's Appeal, 105 Penn. St. 31, 37; Newsome *v.* Newsome, L. R. 2 P. & D. 306; Jodrell *v.* Jodrell, 9 Beav. 45, 56, 59, and cases *supra;* Symons *v.* Burton, Monro, Acta Cancellariæ, 266.

It seems to me that reason as well as authority is opposed to the decision. The actual return to cohabitation was perfectly lawful, whatever the motive which induced it. I cannot think that it is unlawful to make a lawful act, which the wife may do or not do as she chooses, the consideration of a promise, merely because, by reaction, the making of the promise tends to mingle a worldly motive with whatever other motives the wife may have for renewing cohabitation. No one doubts that marriage is a sufficient consideration for a promise to pay money. Pub. Sts. c. 78, § 1, cl. 3. I do not quite understand why it should be more illegal to make such a promise for the resumption than for the assumption of conjugal relations.

I agree too to what is said in Adams *v.* Adams, *ubi supra.* The

arrangements "tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other."

I am authorized to say that Mr. Justice CHARLES ALLEN and Mr. Justice KNOWLTON concur in this opinion.[1]

SECTION VI
EFFECT OF ILLEGALITY

AUSTIN BLACK *v.* SECURITY MUTUAL LIFE ASSOCIATION

SUPREME JUDICIAL COURT OF MAINE, January 31, 1901

[*Reported in* 95 *Maine,* 35]

WISWELL, C. J. Action of assumpsit upon an account annexed to the writ to recover commissions upon premiums paid by various persons to the defendant on policies of life insurance issued by it, the applications for which were solicited, received and forwarded to the defendant by the plaintiff, under a written contract between the plaintiff and the defendant, wherein the plaintiff was appointed an agent of the defendant "for the purpose of procuring and effecting applications for insurance," and which provided for the compensation that was to be received by the plaintiff.

At the trial, the defendant, among other defenses, contended that some or all of the applications of these persons for insurance were solicited, received and forwarded to the defendant at a time when the plaintiff had no license from the insurance commissioner of

[1] In Polson *v.* Stewart, 167 Mass. 211, a covenant given in consideration of the forbearance to bring a well-founded suit for divorce was enforced. In Barbour *v.* Barbour, 49 N. J. Eq. 429, a promise in consideration of such forbearance and the resumption of conjugal relations was enforced. The decision was reversed in 51 N. J. Eq. 267, but not on the ground of illegality of the contract.

Agreements to facilitate divorce or separation are contrary to public policy. Williston on Contracts, § 1742 *et seq.* and cases cited. Even a contract to prevent a contemplated marriage of a relative with a woman of bad character has been held invalid. Sheppy *v.* Stevens, 177 Fed. 484.

Contracts of marriage brokage are also illegal. Greenhood, 478 *et seq.;* Morrison *v.* Rogers, 115 Cal. 252; Hellen *v.* Anderson, 83 Ill. App. 506; Johnson *v.* Hunt, 81 Ky. 321; Andiff *v.* June, 81 Mich. 477; Duval *v.* Wellman, 124 N. Y. 156. See also 61 L. R. A. 641 *n*

this state, as provided by R. S., c. 49, § 73, and subsequent amendments, and that consequently the plaintiff could not recover. The case shows that the plaintiff had no such license between July 1 and October 18, 1897.

Thereupon the defendant's counsel requested the presiding justice to instruct the jury that the plaintiff could not recover any commission upon the premiums paid to the company in cases where the applications for such insurance were solicited by the plaintiff during the period that he was without such a license. The requested instruction was applicable to the state of facts involved, because although the policies may have been in fact issued after October 18, 1897, and during a period when the plaintiff had a license, it is clear that in more or less instances the plaintiff's work in soliciting and receiving applications for the policies was performed during the period that he was without a license.

In order to give progress to the case, the presiding justice declined to give the requested instruction — but did instruct the jury, "that for any policy bearing date subsequent to the 18th of October, the plaintiff is entitled to his commission from the company upon that risk, although he may have solicited the insurance before that time and made himself liable to the penalty." To this refusal to instruct, and to the instruction given, the defendant, the verdict being for the plaintiff, took exception.

The statute above referred to, as last amended by c. 95 Public Laws of 1895, after providing that the commissioner may issue a license to any person to act as an agent of a domestic insurance company, and to any resident of the state to act as agent of any foreign insurance company, which has received a license as provided by another section, and after fixing the fee that shall be received by the commissioner for each license, contains this language, "and if any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he forfeits not more than fifty dollars for each offense; but any policy issued on such application binds the company if otherwise valid."

Although this statute contains no express provision preventing a recovery for his services by one who acts as an agent of an insurance company without such license, and does not expressly provide that contracts for such services shall be void, it prohibits the performance of such services without the license referred to under the penalty therein provided. In Harding *v.* Hagar, 60 Maine, 340, a very similar case in principle, this court said in its opinion: "It is too well settled to require the citation of authorities, that no party can recover for acts or services done in direct contravention of an express statute, or for property so sold and delivered." In Randall *v.* Tuell, 89 Maine, 443, where the authorities are fully

collected, the principle is thus stated: "It is the general doctrine now settled by the great weight of legal authority, that where a license is required for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void."

In accordance with these authorities, and many others that might be referred to, it must be held that the plaintiff cannot recover for the services performed by him in direct contravention of the statute. The purpose of the statute is undoubtedly for the protection of the public. It is clearly not for revenue.[1] The license fee required was only the sum of two dollars. True, the statute referred to provides that a policy issued in such a case shall not thereby be void, but the contract of insurance is not the one under consideration here; it is the contract between the company and the plaintiff by virtue of which the latter performs services in obtaining applications for insurance, which the statute prohibits, unless the person performing such service has a license therefor.

The evidence as to when these applications for insurance were solicited and obtained by the plaintiff, is somewhat indefinite, but some of them were unquestionably received when the plaintiff had no license and the burden is upon him to show that he had a license when the services were performed. Harding *v.* Hagar, *supra.*

Exceptions sustained.

JOHN BISBEE *v.* MARY McALLEN

MINNESOTA SUPREME COURT, August 28, 1888

[*Reported in* 39 *Minnesota,* 143]

VANDERBURGH, J. The question presented for consideration in this case is raised upon the sufficiency of the second defence set up in the answer, where it appears that the goods alleged to have been sold to the defendant, and for the price of which this action is brought, were sold by weight and measurement, and that such weight

[1] In the following cases it was held to afford no defence to a contract that it was made in violation of a revenue law.

Johnson *v.* Hudson, 11 East, 180; Brown *v.* Duncan, 10 B. & C. 93; Smith *v.* Mawhood, 14 M. & W. 452; Harris *v.* Runnels, 12 How. 79; Banks *v.* McCosker, 82 Md. 518; Coates *v.* Locust, 102 Md. 291; Goldsmith *v.* Manufacturers' Liability Ins. Co., 132 Md. 283; Larned *v.* Andrews, 106 Mass. 435; Mandlebaum *v.* Gregovitch, 17 Nev. 87; Corning *v.* Abbott, 54 N. H. 469; Ruckman *v.* Bergholz, 37 N. J. L. 437; Woodward *v.* Stearns, 10 Abb. Pr. N. S. 395 (see also Griffith *v.* Wells, 3 Denio, 226); Rahter *v.* First Nat. Bank, 92 Pa. 393 (see also Hertzley *v.* Geigley, 196 Pa. 419); Aiken *v.* Blaisdell, 41 Vt. 655. But see *contra* Creekmore *v.* Chitwood, 7 Bush, 317; Harding *v.* Hagar, 60 Me. 340, 63 Me. 515 (but see Randall *v.* Tuell, 89 Me. 442, 448); Curran *v.* Downs, 3 Mo. App. 468; Hall *v.* Bishop, 3 Daly, 109; Best *v.* Bauder, 29 How. Pr. 489; Condon *v.* Walker, 1 Yeates, 483; Sewell *v.* Richmond, Taylor (U. C. K. B.) 423; Mullen *v.* Kerr, 6 U. C. Q. B. (o. s.) 171.

and measurement were unlawfully ascertained and fixed by certain unsealed measures, scales, and weights, which had never been proved, tested, or sealed, as required by the statute. Under Gen. St. 1878, c. 21, § 11, a sale of goods, wares, and merchandise by any scale-beam, steelyard, weight, or measure, not proved and sealed in accordance with the provisions of that chapter, is made a misdemeanor, and subjects the person making such sale to a penalty of not less than five nor more than one hundred dollars. The provision for a penalty in this section implies a prohibition of such sales. That is to say, if goods are sold by weight or measure, the law absolutely requires that the scales or measures used should be approved by the sealer of weights and measures for the county, as the statute provides.

It stands admitted upon the record, then, in this case, that the sale in question here, as made, was prohibited, and in violation of the statute. The weighing or measuring is not a collateral matter, but is directly involved in the act of selling and the contract of sale. It regulates the quantity to be delivered and the amount to be paid. And where the statute has in view the prevention of fraud by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be upheld. Griffith *v.* Wells, 3 Denio, 226, and cases; Lewis *v.* Welch, 14 N. H. 294. Here the intent of the statute is clearly to prevent sales by unproved and unsealed scales or measures, and its object is undoubtedly to protect the public from fraud or imposition by the use of false or inaccurate balances and measurements. It covers all cases of sales by weight or measure, and this case is clearly within it. The doctrine appears to be too well settled to require extended discussion. Brackett *v.* Hoyt, 29 N. H. 264; Smith *v.* Arnold, 106 Mass. 269; Woods *v.* Armstrong, 54 Ala. 150 (25 Am. Rep. 671, notes and cases); Ingersoll *v.* Randall, 14 Minn. 304 (400). In some cases a remedy has been suggested and recognized outside the prohibited contract. Pratt *v.* Short, 79 N. Y. 437, 445. But no such question is involved in this case. In respect to defences of this kind, we adopt the language of the court in Lewis *v.* Welch, *supra:* "The objection that the contract is illegal as between the parties is never very creditable to him who makes it. But it is not out of favor to him that the objection is sustained, but from regard to the law. The advantage he derives from it is altogether accidental." The supposed hardships of particular cases must yield to the general purposes of the act, and the modification of the law, if any shall be found necessary, must be by the legislature. *Order affirmed.*[1]

[1] Law *v.* Hodson, 11 East, 300; Little *v.* Poole, 9 B. & Co. 192; Forster *v.* Taylor, 5 B. & Ad. 887; Miller *v.* Ammon, 145 U. S. 421; Hawkins *v.* Smith, 2 Cr. C. C. 173; Thompson *v.* Milligan, 2 Cr. C. C. 173; Lang *v.* Lynch, 38 Fed. Rep. 489; Gunter *v.* Leckey, 30 Ala. 591; Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Merriman *v.* Knox, 99 Ala. 93; Gardner *v.* Tatum, 81 Cal. 370; Kleckley *v.* Leyden, 63 Ga. 215; Johnston *v.* McConnell, 65 Ga. 129; Lorentz *v.* Conner, 69 Ga. 761; Tedrick *v.* Hiner, 61

JOHN LEUTHOLD *v.* CHARLES A. STICKNEY

MINNESOTA SUPREME COURT, December 22, 1911

[*Reported in* 116 *Minnesota,* 229]

SIMPSON, J. This is an action brought by the plaintiff to recover rent claimed to be due from the defendant. The plaintiff leased to the defendant, by written lease, a seven-room flat on the fourth floor of an apartment building in the city of St. Paul for one year from September 1, 1909. The building is four stories in height above the basement, and covers an area of about seventy-five hundred square feet. There are four flats on each floor, making sixteen flats in all. Each flat accommodated four or more people, and was usually occupied by from two to four people. During the term covered by the lease to defendant there was not, either within or without said building, or in any way connected therewith, any noncombustible ladder or stairway or standpipe. Plaintiff, with his family of seven, occupied and leased premises until the latter part of February, 1910, when he moved and permanently vacated them. He paid the stipulated rent for the full time of his occupancy. This action is brought to recover rent for the remainder of the term. About a month before the defendant vacated the premises he asked the plaintiff to put fire escapes on the building, and when he moved out he assigned the absence of fire escapes as his reason for so doing.

The case was tried by a court without a jury. The court found to be true the facts already stated, and, in addition, that the apartment building was within Class III as defined by Section 2365, c. 36, R. L. 1905, relating to protection against fire, and that the plaintiff had failed to maintain the tenement building in the condition as to fire escapes required by the statute, and found, as a

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Ill. 189; East St. Louis *v.* Freels, 17 Ill. App. 338; Hustis *v.* Picklands, 27 Ill. App. 270; Richardson *v.* Brix, 94 Ia. 626; Dolson *v.* Hope, 7 Kan. 161; Vannoy *v.* Patton, 5 B. Mon. 248; Mabry *v.* Bullock, 7 Dana, 337; Bull *v.* Harragan. 17 B. Mon. 349; Buxton *v.* Hamblen, 32 Me. 448; Durgin *v.* Dyer, 68 Me. 143; Richmond *v.* Foss, 77 Me. 590; Black *v.* Security Mut. Assoc., 95 Me. 35; Miller *v.* Post, 1 Allen, 434; Libby *v.* Downey, 5 Allen, 299; Wheeler *v.* Russell, 17 Mass. 257; Hewes *v.* Platts, 12 Gray, 143; Smith *v.* Arnold, 106 Mass. 269; Sawyer *v.* Smith, 109 Mass. 220; Eaton *v.* Kegan, 114 Mass. 433; Prescott *v.* Battersby, 119 Mass. 285; Loranger *v.* Jardine, 56 Mich. 518; Solomon *v.* Dreschler, 4 Minn. 278; Buckley *v.* Humason, 50 Minn. 195; Pray *v.* Burbank, 10 N. H. 377; Lewis *v.* Welch, 14 N. H. 294; Caldwell *v.* Wentworth, 14 N. H. 431; Doe *v.* Burnham, 31 N. H. 426; Griffith *v.* Wells, 3 Denio, 226; Covington *v.* Threadgill, 88 N. C. 186; Holt *v.* Green, 73 Pa. 198; Johnson *v.* Hulings, 103 Pa. 498; Swing *v.* Munson, 191 Pa. 582; McConnell *v.* Kitchens, 20 S. C. 430; Stephenson *v.* Ewing, 87 Tenn. 46; Bancroft *v.* Dumas, 21 Vt. 456; Gorsuth *v.* Butterfield, 2 Wis. 237, *acc.* See also Singer Mfg. Co. *v.* Draper, 103 Tenn. 262.

Compare Harris *v.* Runnels, 12 How. 79; The Manistee, 5 Biss. 381; The Charles E. Wisewall, 74 Fed. Rep. 802; Pangborn *v.* Westlake, 36 Ia. 547; Coombs *v.* Emery, 14 Me. 404; Ritchie *v.* Boynton, 114 Mass. 431; Houck *v.* Wright, 77 Miss. 476, Drake *v.* Siebold, 81 Hun. 178; Strong *v.* Darling, 9 Ohio, 201; Niemeyer *v.* Wright, 75 Va. 239; National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352.

conclusion of law, that the defendant was entitled to judgment in his favor in said action. The plaintiff appeals from an order of the court denying his motion for a new trial.

1. The plaintiff questions the sufficiency of the evidence to sustain the finding of the trial court that the apartment building here involved is within Class III of the statute relating to fire protection.

Section 2365, R. L. 1905, defines buildings of Class III as follows: "Tenements, flat buildings, and boarding houses, more than two stories high, accommodating more than twenty persons, whether in one family or more. Other related sections are as follows:

"2368. For each five thousand feet of area, or fraction thereof, covered by a building in Class III there shall be provided one outside standpipe, as described in section 2367, and one noncombustible ladder or stairway for each twenty persons, or fraction thereof, that such building accommodates above the first story."

"2372. The proprietor and lessee of every building in any of the classes herein before mentioned, shall equip the same in the manner prescribed, and every failure to do so shall constitute a misdemeanor."

Penalties are prescribed for the commission of misdemeanors under the statute.

While the evidence does not show the exact number of persons occupying the apartment building here involved at any given time, it does appear that it was built to accommodate more than sixty-four persons, that during the term of the defendant's lease it was continually occupied for residence purposes, and that the number of persons usually residing therein was a much greater number than the minimum fixed by the statute. The building was divided by a fire wall into two parts, with eight flats in each part. It is suggested that this division made two tenements of the building, within the meaning of the statute relating to fire protection. But, so considered, each part accommodated more than twenty persons and was within Class III of the statute. It fairly appears from the evidence that more than twenty persons actually resided in the part of the building in which the flat leased to the defendant was located during the time of defendant's occupancy.

2. A more important point urged by the plaintiff is that the conclusion reached by the trial court is not sustained by the findings of fact; plaintiff's claim being that, notwithstanding the statute, the lease between the plaintiff and the defendant was valid, and the plaintiff was entitled to judgment for the agreed rent thereunder. Such claim cannot be sustained.

At the time of the making of the lease, and during the entire term covered thereby, the leased premises were not in the condition prescribed by the law of this state relating to fire protection. The plaintiff by his failure to equip the building in the prescribed manner, committed a misdemeanor. This violation of the law was

a continuing one during the entire term of the lease, and affected directly and materially the premises leased. The absence of a fire escape, in the view of the law, made the leased premises dangerous and their occupancy opposed to the public policy expressed in the law. The permitted occupancy of the premises is the sole consideration for the promise to pay rent here sought to be enforced. Plaintiff's claim for rent cannot be separated from his unlawful act in failing to provide the premises with the prescribed fire escape.

The instant case clearly falls with the rule established in this state in the case of Ingersoll *v.* Randall, 14 Minn. 304 (400). In that action, brought to recover for plaintiff's services in threshing for the defendant, the defense was interposed that on the machine used by the plaintiff the knuckles and rods were not covered as required by law. The court, in holding that the plaintiff could not recover, stated: "The statute before cited not only makes it a duty to cover the knuckles and rods, but it makes neglect or refusal so to do a misdemeanor to which a penalty is affixed. The plaintiff, then, in operating his threshing machine in threshing for the defendant without covering the knuckles and rods, was doing that which is prohibited by law. The threshing, which was the consideration of the defendant's promise, was unlawful, and therefore will not support the promise. Bensley *v.* Bignold, 5 Barn. & Adol, 335; Cunard *v.* Hyde, 105 E. C. L. 1; Chit. Cont. 658, and note "h," Armstrong *v.* Toler, 11 Wheat, 272 [6 L. Ed. 468] and cases *supra;* Emery *v.* Kempton, 2 Gray, 257." The rule so laid down has never been departed from in this state, and has been applied in numerous cases: Bisbee *v.* McAllen, 39 Minn. 143, 39 N. W. 299; Handy *v.* St. Paul Globe Pub. Co. 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. 695; Stolz *v.* Thompson, 44 Minn. 271, 46 N. W. 410; G. Heileman Brewing Co. *v.* Peimeisl, 85 Minn. 121, 88 N. W. 441; Thomas Mnfg. Co. *v.* Knapp, 101 Minn. 432, 112 N. W. 989.

It is urged by counsel for the plaintiff that chapter 301 of the Laws of 1903 provided, as an additional penalty for failure on the part of the owner of a hotel to equip it with required fire escapes, that no action should be maintained for board, lodging, or accommodations therein, and that by the omission of such permission in reference to tenements the legislative intent is shown not to make a failure to comply with the statute a defense to an action for rent of flats in tenement buildings. Chapter 301 of the Laws of 1903 was amended by chapter 343 of the General Laws of 1905, and the special provision referred to concerning hotels was omitted from the amending act. Therefore the basis of the construction contended for by plaintiff's counsel no longer exists.

The unlawful act of the plaintiff in failing to equip the leased premises with a fire escape taints the entire consideration of the promise he here seeks to enforce. To permit a recovery upon such

promise would tend to defeat the purpose of the statute. The statute is designed to protect persons permanently or temporarily in buildings of the enumerated classes to some extent from the dangers incident to conflagrations. The defendant cannot be required by the plaintiff to occupy or pay rent for premises maintained in a dangerous condition through the plaintiff's continuing unlawful act.

Affirmed.

GERRY L. BROOKS *v.* VOLUNTEER HARBOR NO. 4, AMERICAN ASSOCIATION OF MASTERS, MATES AND PILOTS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 2–June 18, 1919

[*Reported in* 233 *Massachusetts,* 168]

CARROLL, J. The plaintiff, a member of the bar of the State of Maine but not admitted to practice in the courts of this Commonwealth, sued to recover for legal services rendered to the defendant. There was evidence that he had acted, to a limited extent, as attorney of the National Association of Masters, Mates and Pilots, and while so acting had business relations with the defendant, a local harbor or chapter of the National Association.

The plaintiff testified that, at the request of the defendant's secretary, he came to Boston and met some of its officers, who sought his advice respecting a suit brought against the defendant and some of its members, pending in the Superior Court for the county of Suffolk; that he informed the defendant he was not admitted to practice in the courts of this State and it would be necessary to employ local counsel; and that on being authorized to do so, he secured the services of a Massachusetts firm of attorneys, who appeared of record in the case and conducted the defence. The defendant's answer alleges that the plaintiff was not admitted to practice law in this Commonwealth. There was evidence that the plaintiff was regularly employed by the defendant and performed services. The jury found for the plaintiff.

The only question open on this record is whether the plaintiff is prevented from recovering because not admitted to practice law in the courts of this Commonwealth. R. L. c. 165, § 45, as amended by St. 1914, c. 432, provides: "Whoever, not having been admitted to practice as an attorney at law in accordance with the provisions of this chapter, represents himself to be an attorney or counsellor at law, or to be lawfully qualified to practice in the courts of this Commonwealth, by means of a sign, business card, letter head or otherwise," shall be punished as provided in this section.

There was evidence that the plaintiff in no way held himself

out as lawfully qualified to practice in the courts of Massachusetts, that he informed the defendant he "was not admitted in the State court," and it would be necessary for it to have local counsel. The jury were carefully instructed on this point. They were told that it was for them to decide upon the evidence whether the plaintiff pretended that he had a right to appear for the defendant in the Superior Court. By their finding the jury decided that the plaintiff did not violate this statute.

The cases of Browne *v.* Phelps, 211 Mass. 376, and Ames *v.* Gilman, 10 Met. 239, are not applicable. In the first case the plaintiffs were partners; one member of the firm, who was not admitted to practice law in this Commonwealth, represented that he was an attorney and counsellor at law lawfully qualified to practice. In Ames *v.* Gilman, the plaintiff held himself out as an attorney at law, although not authorized to practice in this Commonwealth. In the case at bar, the plaintiff performed legal services for the defendant at its request, although a member of the bar of another State; we see nothing in the evidence to prevent him from recovering a reasonable compensation for the services so rendered.

There was no error in the charge of the presiding judge. The jury were told the plaintiff could not recover if he pretended to be an attorney or attempted to practice law while falsely representing he was authorized to practice; but that it was not a violation of law for a member of the bar of another State to consult with clients in Massachusetts or to perform legal services for them. The defendant's requests were properly refused. *Exceptions overruled.*

ANGELO PELOSI *v.* GILBERT D. BUGBEE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 16–May 21, 1914

[*Reported in* 217 *Massachusetts,* 579]

CROSBY, J. This was an action of tort for the conversion of a diamond ring. The ring was sold by the plaintiff to one Tedesco under a conditional contract or lease so called, a copy of which is annexed to the bill of exceptions. By the terms of this contract or lease it appears that Tedesco, "who paid a small sum upon delivery, agreed to pay the balance upon weekly instalments, and . . . executed at the same time a written agreement . . . by the terms of which the plaintiff was to retain title to the ring until paid for. Upon failure to pay any instalment when due, or for any other breach of the lease, the plaintiff could demand, or retake the ring without legal process." From the agreed facts it further appears that "before the amount stipulated was paid to the plaintiff the

vendee pawned the ring with the defendant, who is a licensed pawnbroker, . . . who took the pledge in good faith and with no knowledge that Tedesco, the pawnor, held the ring under a conditional sale agreement." From the agreed facts it also appears that the plaintiff had no store or other regular place of business, but sold jewelry, going from town to town and from place to place in the same town, carrying the jewelry for sale and exposing it for sale. He sold for cash or upon the instalment plan, and upon arranging terms would immediately deliver the article of jewelry to the purchaser, but "was not a selling agent to dealers in the usual course of business, nor did he sell his jewelry by sample for future delivery."

From these undisputed facts it is clear that the plaintiff was a pedler within the meaning of R. L. c. 65, § 13, and that the sale was in violation of § 14 of the same chapter, and the trial judge correctly so ruled.

The defendant contends that the plaintiff, having sold the ring in violation of the provisions of the statute, is barred from recovery. It is well settled that, as a general rule, contracts made in violation of a statute cannot be enforced. For this reason, the law gives no remedy for a breach of contract made upon Sunday, or upon a gaming or wagering contract. In certain cases it has been held that contracts made in violation of the provisions of statutes are not void on the ground that the provisions of the statutes are intended to be only directory, and not conditions precedent to the validity of contracts made with reference to them. Bowditch *v.* New England Mutual Life Ins. Co. 141 Mass. 292. As was said by Gray, J., in Hall *v.* Corcoran, 107 Mass. 251, 253, "The general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequence of his own illegal act." Jones *v.* Andover, 10 Allen, 18. Welch *v.* Wesson, 6 Gray, 505. Stanton *v.* Metropolitan Railroad, 14 Allen, 485. Towne *v.* Wiley, 23 Vt. 355. Lewis *v.* Littlefield, 15 Maine, 233. It is also well settled, however, that after such a contract has been executed and completed, the law will not allow either party to avoid its effect or to recover back what he may have paid or parted with under the contract. Horton *v.* Buffinton, 105 Mass. 399. Upon grounds of public policy the law leaves the parties in such cases where they have placed themselves and without remedy against each other, but the fact that the owner of property has violated the law with reference to it is not a bar to an action by him against a wrongdoer to whose wrongful act the plaintiff's illegal conduct has not contributed. The contract between the plaintiff and Tedesco being illegal, neither party will be allowed to maintain an action to enforce any claim under it. The plaintiff in the case at bar, however, is not seeking to enforce any rights under the illegal contract made with Tedesco, but seeks to recover the value of the ring, to

which he claims title and which has been converted by the defendant. The agreement between the plaintiff and Tedesco provided that the title to the ring should remain in the plaintiff until paid for, and while this agreement was void and could not be enforced by either party to it because of its illegality, yet the title to the ring was not changed thereby. It still remained in the plaintiff, whose title was not affected by the delivery of possession of the ring to Tedesco. The plaintiff's general property in the ring did not arise from the illegal contract, nor was it determined by it. This action is based upon the conversion by the defendant of the plaintiff's property and is wholly independent of the contract between the plaintiff and Tedesco. It is true that the delivery of possession of the ring to Tedesco was under an unlawful agreement which could not be enforced, yet that fact does not affect the liability of the defendant for his wrongful act in converting to his use the plaintiff's property. This distinction is recognized in Hall *v.* Corcoran, 107 Mass. 251. It is clear upon principle and authority that while the plaintiff cannot enforce the illegal contract, he may maintain an action for conversion. That rule is stated by Parker, C. J., in Dwight *v.* Brewster, 1 Pick. 50, 55: "The principle settled is, that a party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract, who becomes possessed of the property of the other party, with which he is to do something which the law prohibits, can acquire a right to that property. The contract being void, the property is not changed, if it remains in the hands of him to whom it is committed. If he has executed the contract with it, or it has become forfeited by judicial process, or if stolen or lost without his fault, he may defend himself against any demand of the owner in ordinary cases; but if he has it in his possession, he must be liable for the value of it; so that in an action of trover, with proper evidence of a conversion, the plaintiff would undoubtedly prevail." The defendant as the pledgee of the ring acquired no greater rights in the property as against the plaintiff than Tedesco, the pledgor. In Ladd *v.* Rogers, 11 Allen, 209, the action was in contract for the price of a horse which the plaintiff had sold to the defendant on Sunday and which had been kept by the purchaser. It was decided that the action could not be maintained as the contract was illegal, but, if the defendant subsequently converted the horse to his own use, the plaintiff to recover must adopt the form of action suited to such an injury. Myers *v.* Meinrath, 101 Mass. 366. Hall *v.* Corcoran, 107 Mass. 251. Cranson *v.* Goss, 107 Mass. 439.

In the case at bar the defendant was not a party to the illegal contract, but was an independent wrongdoer, who has refused to return the ring after demand made by the plaintiff. We are of the opinion that the judge rightly refused to give the plaintiff's first,

fourth, fifth and sixth requests. The exceptions must be overruled; and; under the agreement of parties stated in the exceptions, judgment is to be entered for the plaintiff upon the finding in the sum of $150. *So ordered.*

MILLWARD *v.* LITTLEWOOD

In the Exchequer, November 6, 1850

[*Reported in* 5 *Exchequer,* 775]

Assumpsit. The declaration stated, that on, &c., in consideration that the plaintiff, being sole and unmarried, had, at the defendant's request, promised the defendant to marry him, the defendant promised the plaintiff to marry her. Averment, that the plaintiff hath always, from the time of the making of the defendant's promise, for a reasonable time, to wit, until, &c., continued and still is unmarried, and was, from the time of the defendant's promise until the discovery hereinafter mentioned, ready and willing to marry the defendant. That after the making of the defendant's promise, and before the commencement of this suit, to wit, on &c., the plaintiff discovered that the defendant was then married, to wit, to one Hannah Littlewood; and that the defendant, at the time of making his promise, and from thence hitherto, hath been and still is married and that the plaintiff had not, at the time of the defendant's then promise, any notice of the defendant's then marriage.

Pleas, first, non-assumpsit; secondly, that the plaintiff had notice of the defendant's marriage.

At the trial, before Parke, B., at the last Chester Summer Assizes, the jury found a verdict for the plaintiff, damages £200.

Herbert Jones, Serjt., now moved to arrest the judgment. It is conceded that this case is similar to Wild *v.* Harris, 7 C. B. 999, where the declaration alleged that, in consideration that the plaintiff, being unmarried, had promised the defendant to marry him within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; that the plaintiff remained unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him; that, although a reasonable time had elapsed, the defendant had not married the plaintiff, but, on the contrary, the defendant, at the time of his promise, was and still is married to another woman; and on the motion in arrest of judgment, the Court of Common Pleas held that the declaration disclosed a sufficient consideration for the defendant's promise; at the same time observing that it was not absolutely impossible of performance, for the defendant's wife might have died within a reasonable time. The only difference between that case and the present is that there the promise alleged was to marry within a reasonable time, here it is to marry generally. It is submitted,

however, that the case of Wild *v.* Harris cannot be supported. A contract of this kind is *contra bonos mores,* and against public policy. The language of Lord Mansfield, in Holman *v.* Johnson, Cowp. 343, with reference to immoral and illegal contracts, applies here. Besides, at the time of the promise, the defendant could not perform it, and therefore the promise is void. The Court of Common Pleas founded their judgment on the authority of Brooke's Abridgment, tit. "Conditions," fol. 152 b, pl. 119. That, however, professes to be an abridgment of the case in 40 Ass. 13, where the reporter adds, "*quære de isto judicio;* for it seems that the condition was void, because the foeffee had a wife at the time." [Parke, B. — In Fitz. Nat. Brev. p. 205, H., it is said, "A woman enfeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment, and afterwards, the woman, for not performing the condition, entered again into the land upon the second feoffee, and her entry was adjudged lawful, and the condition good." Ann. 40 Ed. 3, Lib. Ass.]

POLLOCK, C. B. There ought to be no rule. The case of Wild *v.* Harris does not in substance differ from this. Therefore, as there is the judgment of a court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a Court of Error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection which ought to subsist between married persons that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think that, by the law of the land, such a promise is good.

ALDERSON, B. It is unnecessary to decide whether a promise by a man to marry a woman after his wife's death is good, because here it is found as a fact that the plaintiff had no knowledge that the defendant was married. In my opinion the difficulty arises in respect of the promise alleged being a promise to marry within an indefinite time. What was decided by the recent case in the Court of Common Pleas, I think, was rightly decided.

PARKE, B. I entirely concur in what has been said by the Court of Common Pleas in Wild *v.* Harris. The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it. The consideration to support the promise is, that the plaintiff, at the request of the defendant, engaged to marry him within a reasonable time, and therefore she remained unmarried; and that is a sufficient consideration to bind the defendant. It is unnecessary to express any opinion whether a promise by a married man to marry a woman after his wife's death is valid or not. The passage in Fitzherbert's Abridgment tends to show that it is a good promise. Here, however, it is enough to say that there is a sufficient considera-

tion for the defendant's promise, namely, that the plaintiff remained unmarried; and if she discovered, on the day after the defendant's promise, that he was a married man, I should nevertheless say that the consideration would be sufficient. *Rule refused.*[1]

WAUGH *v.* MORRIS

IN THE QUEEN'S BENCH, January 24, 1873

[*Reported in Law Reports,* 8 *Queen's Bench,* 202]

BLACKBURN, J. This is an action brought by the owner of a ship against the charterer for detaining the ship, in which the plaintiff has obtained a verdict, subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before the Lord Chief Justice the material facts appeared to be, that the charter-party was made in France on the 7th of October, 1871, between the agent of the defendant and the master of the ship.

By the charter-party it was stipulated that the ship, then at Trouville, a port in France, should there load a cargo of pressed hay and proceed therewith direct to London; and a term in the charter-party was to the effect that all cargo should be brought and taken from the ship *alongside.*

The defendant's agent verbally told the master that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do.

On arriving in the Thames the master proposed to proceed to the wharf, but then for the first time learned that by an Order in Council, made under the authority of the Cattle Diseases Act, France was declared to be an infected country, and it was made illegal to *land* in Great Britian any hay brought from that country. He could not therefore proceed to the wharf and there deliver the cargo, for that would have been landing the hay, and illegal. After some delay the defendant received the cargo from alongside the ship in the river into another vessel and exported it. There was no legal objection to this being done, but during the interval eighteen days beyond the lay-days elapsed, and it was for this detention that the plaintiff recovered.

It appeared that the Order in Council had been made and published before the charter-party was entered into, and that in fact

[1] Wild *v.* Harris, 7 C. B. 999; Daniel *v.* Bowles, 2 C. & P. 553; Paddock *v.* Robinson, 63 Ill. 99, 100; Davis *v.* Pryor, 3 Ind. Ty. 396; Kelley *v.* Riley, 106 Mass. 339; Stevenson *v.* Pettis, 12 Phila. 468; Cooper *v.* Davenport, 1 Heisk. 368, *acc.* In Blattmacher *v.* Saal, 29 Barb. 22, and Pollock *v.* Sullivan, 53 Vt. 507, it was held that an action of tort for deceit would lie, but not an action for breach of contract.

neither the master of the ship nor the defendant's agent was aware that it had been made.

A rule was obtained, which was argued in Michaelmas Term before my Lord Chief Justice, my brother Mellor, and myself, when the court took time to consider.

We are of opinion that the rule should be discharged. The charter-party provides that the cargo was to be taken from alongside; and that being so, the consignee might select any legal and reasonable place within the port at which to take it from alongside. He, by his agent in France, named the wharf, which he supposed, erroneously, to be a legal place, and the master, under the same mistake, assented to this, as indeed he would have had no right to refuse it, if it had really been a legal place. But when it turned out that the defendant had named a place for the performance of the contract where the performance was impossible, because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable. See "The Teutonia," L. R. 4 P. C. 171, a case which would have been precisely in point, if the Order in Council rendering the landing illegal had come into operation after the contract was made instead of before.

It was on the fact that the Order in Council existed at the time the contract was made that the argument for the defendant was mainly grounded.

It was said that the intention of both parties was, that the hay was to be landed, that therefore they intended to violate the law, and that it may be shown by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference. But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He no doubt contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object; but all that the ship-owner bargained for, and all that he can properly be said to have intended was that, on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transshipped the hay and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in Pearce *v.* Brooks, L. R. 1 Ex. 213, it is done for the very object of satisfying an illegal purpose, or, as it is expressed in McKinnell *v.* Robinson, 3 M. & W. at p. 442, "for the express purpose of a viola-

tion of the law." But in the present case the ship-owner never did even contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods, which he thought was lawful; but if he had thought at all of the possibility of landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.

We quite agree that, where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think that, in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance.

No one could for a moment contend that, if everything which happened in France had happened within the jurisdiction of our country, the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing these goods; for there would have been a want of *mens rea.* And it seems to us that the *mens rea* is as necessary to avoid a contract which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible. *Rule discharged.*

MARTIN ROSENBAUM, Plaintiff in Error, *v.* UNITED STATES CREDIT SYSTEM COMPANY, Defendant in Error

New Jersey Court of Errors and Appeals, June 28, 1900–January 25, 1901

[*Reported in* 65 *New Jersey Law,* 255]

Collins, J.[1] On December 1, 1892, the defendant, a New Jersey corporation engaged in the business of indemnifying against losses on credits, made a written contract with the plaintiff appointing him its agent in and for the State of Massachusetts for the term of five years, for a percentage on the amount of business secured as his compensation. The plaintiff, on his part in said written contract, agreed to act as such agent for the term named and to procure business to an extent stated each quarter — failing which the

[1] Portions of this opinion are omitted in which it was held that the plaintiff's agreement not to engage in similar business for three years, even if unenforceable, did not invalidate the rest of the contract, and in which the provisions of the Massachusetts statute referred to are stated.

defendant might, at its option, terminate the contract; and further agreed that should he cease to be the defendant's agent, he would not engage in like business for three years thereafter. On September 4, 1894, the defendant was adjudged insolvent and a receiver was appointed for its creditors and stockholders. On October 2, 1894, its charter was forfeited, except for the purpose of collecting and distributing its assets. The plaintiff presented to the receiver a claim for damages for breach of said contract. The claim being disputed, the Chancellor authorized an issue or issues at law to determine its validity. The Supreme Court overruled a demurrer by the plaintiff to a plea of such insolvency and forfeiture, but on writ of error it was adjudged, by this court, that there was a breach of the contract, and that the forfeiture of the defendant's charter would not bar recovery of damages for such breach. Rosenbaum *v.* United States Credit System Co., 23 Vroom, 543, reversing 31 id. 294.

The Supreme Court had also decided to overrule the plaintiff's demurrer to a plea that the business of the defendant was unlawful in Massachusetts; but after the announcement of the decision that plea was withdrawn, as were certain other pleas held to be faulty, so that the judgment reviewed went only on the plea of insolvency and forfeiture. After the reversal the pleadings were recast and the cause proceeded to issue of fact. Trial was had in the Essex Circuit, resulting in a verdict for the plaintiff, which was set aside and a new trial ordered by the Supreme Court *in banc.* The report of the decision is in 35 Vroom, 35. Legal questions only were discussed — first, whether the plaintiff's agreement not to engage in business like that of the defendant for three years after he should cease to be its agent invalidated the entire contract, and second, the effect of alleged unlawfulness in Massachusetts of such business, a plea of that purport having been renewed. The first question was decided in favor of the plaintiff on the authority of Fishell *v.* Gray, 31 Vroom, 5. The second question was decided in favor of the defendant. Under the pleadings, as recited in the opinion read by Mr. Justice Van Syckel, the unlawfulness alleged was not disputed. The court's decision was merely that the plaintiff's ignorance of it gave him no right of action for breach of the contract, but that concealment from him by the defendant of its knowledge of it would entitle him to damages, in tort, under pleadings to be moulded accordingly.[1] Before the new trial, now the

[1] The conclusion of the opinion is as follows:

"We are therefore of the opinion that it was correctly ruled in Rosenbaum *v.* Credit System Co., 31 Vroom, 294, that no action can be maintained for failure to employ the plaintiff to do an act for which he was punishable by the Massachusetts law.

"Rosenbaum's compensation was to be a percentage upon the amount of business he transacted. He could not be compelled to do acts forbidden by law, nor can he require the company to pay him for services which he cannot render because the law forbids under a penalty.

"But, assuming that the plaintiff did not know of the existence of the Massachusetts

subject of review, I judge that new replications and subsequent pleadings were filed. In the present record the first plea is *non est factum,* on which issue is joined. The second plea is that the contract is void because a part of the consideration for the defendant's agreement was an agreement, by the plaintiff, not to engage, for three years after he should cease to be agent for the defendant, in any business like that of the defendant, which restriction is alleged to be unreasonable. The replication is that the restriction was reasonable, and on this issue is joined. The third plea sets out, *in extenso,* the statute of Massachusetts, hereinafter referred to, and avers that the business of the defendant, for which the plaintiff was agent, was, at the time of the contract, unlawful in that State. To this plea there are four replications. The first avers that, at the time of the contract, the plaintiff was a resident of Illinois, and ignorant of the laws of Massachusetts; the second avers to the same effect, and also that the defendant was cognizant of those laws, and had been refused a license to transact its business in Massachusetts, which matters it fraudulently concealed from the plaintiff; the third avers that the defendant knew and the plaintiff was ignorant of the laws of Massachusetts, and the fourth avers that defendant's business was not unlawful in that State. Issue is tendered on these several replications, by divers rejoinders concluding to the country, and accepting by formal *similiter.*

At the new trial the evidence at the former trial was used by consent. The plaintiff moved to mould the pleadings so as to present an issue of tort, but the learned trial judge refused to make order to that effect, and his ruling, being discretionary, is not reversible. Verdict in favor of the defendant was directed on the third plea, and the bill of exceptions of the plaintiff presents this direction, for our review, under the present writ of error brought on the consequent judgment against him.

On the first plea a case was made by the plaintiff that the defendant did not attempt to confute, and no support for the direction of a verdict is claimed under that plea. . . .

Nor do I think such direction can stand on the case made under the third plea, which alone moved the learned trial judge to give it.

The covenant of the defendant was not broken because of any supposed unlawfulness of the business contracted for, but because of the defendant's insolvency. Nor was it proved that the business was in fact unlawful. Of course it was not immoral, or, in the broad

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law, and that the defendant company did have knowledge of it when the contract was entered into, a different question is presented. In that case it was clearly a fraudulent act on the part of the defendant company to engage the defendant in a five years' contract, from which the company knew he could derive no advantage, and the fraud was more pronounced in the fact that the plaintiff, in ignorance of the situation, was induced to enter into a contract to engage for a long period in the transaction of a business which would subject him to heavy penalties.

"For damages flowing from the alleged fraud, if proven, the plaintiff may maintain his suit."

sense, illegal, but it is claimed that in Massachusetts it was prohibited by the statute pleaded. . . . The proof at the trial was that before the defendant began its operations in Massachusetts, the Insurance Commissioner had ruled that its business was not insurance within the definition of the statute, and that no certificate of authority to transact it was necessary; and that the plaintiff entered upon his agency as soon as appointed, and without interference on the part of the Massachusetts authorities, transacted a business of large volume for the defendant, down to the time of its becoming insolvent. I think, therefore, that the plaintiff was entitled to have a jury say whether, if the defendant had not become insolvent and ceased to do business, he would not have been permitted to continue in his agency, and on that ground, award him damages. Suppose the term of the contract had expired and the suit brought was for the agreed compensation. Surely an unlawfulness merely theoretical would afford no defence to the action. I see no reason why it should do so when the breach of contract arises only from insolvency.

For all practical purposes the defendant's business was lawful in Massachusetts. Nor can I see that it was theoretically unlawful. One of the purposes for which the formation of insurance companies is authorized by the statute pleaded is "to guarantee the fidelity of persons in positions of trust, private or public, and to act as surety on official bonds, and for the performance of other obligations." It seems to me that the acting as surety for the performance of obligations is exactly the defendant's business which is therefore within both the definition and the permission of the statute. If this view be correct, certificates of authority for the company and its agent to transact it were necessary. Those it behooved the defendant to procure, and it cannot set up its failure to do so as an excuse for the breach of its contract with the plaintiff. But we are referred to the reported case of Claflin *v.* United States Credit System Co., 165 Mass. 501, decided April 1, 1896, in which, it is alleged, the Supreme Court of Massachusetts has interpreted the statute in question, and has held that the business of defendant is in that State unlawful. If this be so, the plaintiff's suit is not thereby defeated. No doubt, after such a decision, the business could no longer be transacted in Massachusetts, and the plaintiff's profits would cease, but the only effect in the present suit would be on the extent of his recovery.

It is not needful to go further for the purposes of this writ of error, but it should be pointed out that the decision cited is not authoritative beyond the point that the business of the defendant was insurance within the definition of the Massachusetts statute. In its application of that adjudication to the case then in hand, the opinion read for the court is ambiguous. The suit was brought upon one of the defendant's contracts of indemnity, and recovery

was contested on grounds not stated in the report of the case. The court *ex mero motu* avoided the contract, saying: "The contract sued on seems to be made unlawful by the provisions of Stat. 1887, ch. 214, § 3, both for the reason that the defendant had not been admitted to transact insurance here and because insurance of credits or accounts is not authorized by the statute." One of these reasons might be good, but both could not be. If credit insurance was unlawful, the defendant could not have been admitted to transact it. If the fact that defendant was not so admitted influenced the decision, the other reason assigned for it was mere *dictum*.

Of course, a plain decision of the Supreme Court of a State, interpreting one of its statutes, should, after its rendition, control judicial interpretation elsewhere, but I think the decision cited leaves the matter in hand still unsettled. The question involved was not argued, and no reference is made in the opinion to the authority to form an insurance company to act as surety for the performance of obligations. It is possible that that provision of the statute, blended as it is with another subject, was overlooked.

If, before the retrial of this action, an authoritative judgment of the Supreme Court of Massachusetts that credit insurance is in that State unlawful shall be pronounced, its effect on the plaintiff's recovery must then be considered.

I shall vote to reverse the present judgment, and award a *venire de novo*.[1]

MAGIE, CHANCELLOR (dissenting). I am constrained to dissent from the opinion of the majority of the court in this case.

The ground of my dissent is this: Rosenbaum, by this action, seeks to liquidate and fix the damages which the defendant company (an insolvent corporation) should be charged with, for the non-performance of a contract made by it with him. The contract contemplated the procurement by Rosenbaum of contracts in the State of Massachusetts for the insurance by the company of accounts and credits. Such contracts have been judicially declared by the courts of that State to be unauthorized and unenforceable. In my judgment, it is immaterial whether the lack of authority to make such contracts was properly predicted upon the omission of a legislative grant or not. For it was directly decided that if such authority has been given, its exercise in that State was unlawful, unless the contracting company had been admitted to transact such business within that State in the manner required by its laws. Claflin *v.* United States Credit Sytem Co., 165 Mass. 501.

As it appears that the defendant company was not thus admitted to transact business in that State, its contracts were properly held to be unlawful. Damages for being prevented by the insolvency of the company from procuring contracts, which the company had no lawful authority to make, cannot, in my judgment, be recoverable.

[1] Rocco *v.* Frapoli, 50 Neb. 665, *contra*.

It is proper to add that the question before us was not involved in the previous decisions reported in 31 Vroom, 294, or 32 Id. 543.

I therefore vote to affirm the judgment.[1]

CHARLES P. BOWDITCH AND ANOTHER, TRUSTEES, *v.* NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 12–March 1, 1886

[*Reported in* 141 *Massachusetts,* 292]

MORTON, C. J. This is an action of tort in the nature of trover, to recover the value of certain negotiable coupon bonds held by the defendant as collateral security for several promissory notes signed by Sidney W. Burgess.

Benjamin F. Burgess held the bonds in dispute as trustee under the will of Lysander A. Ellis, deceased. At several times he applied to the defendant for loans of money upon the notes of his son Sidney, offering these bonds as collateral security. These applications were submitted to the finance committee, a committee charged with the duty of investing the funds of the defendant company, which passed votes authorizing the several loans, and these votes were afterwards approved by the directors. Thereupon Benjamin F. Burgess delivered the bonds to the defendant, and received the amounts of the loans.

Benjamin F. Burgess was a member of the finance committee, and was present at all the meetings, but neither spoke nor voted upon the question of allowing said application. The other members of the committee knew that the loans, though in the name of Sidney W. Burgess, were for the benefit of said Benjamin F. Burgess, or of his firm, composed of himself and Walter Burgess, another son.

At the time said loans were made and said bonds received, Benjamin F. Burgess and his firm were in good financial standing, and the members of the finance security committee, except said Burgess, made the loans and took the security without any knowledge or suspicion that said securities were not the property of said Benjamin F. Burgess, or of said firm, and in the belief that said loans were

[1] Where the illegality of a contract resulted from facts unknown to the plaintiff, he was allowed relief in Hotchkiss *v.* Dickson, 2 Bligh, 348; Congress Spring Co. *v.* Knowlton, 103 U. S. 49; Pullman Palace Car Co. *v.* Central Transportation Co., 65 Fed. Rep. 158; Mobile, &c. R. R. Co. *v.* Dismukes, 94 Ala. 131 (but see Gulf, &c. Ry. Co. *v.* Hefley, 158 U. S. 98; Southern Ry. Co. *v.* Harrison, 119 Ala. 539; Gerber *v.* Wabash R. R. Co., 63 Mo. App. 145; Wyrick *v.* Missouri, &c. Ry. Co., 74 Mo. App. 406); Musson *v.* Fales, 16 Mass. 332; Emery *v.* Kempton, 2 Gray, 257; Beram *v.* Kruscal, 18 N. Y. Misc. 479; Burkholder *v.* Beetem's Adm., 65 Pa. 496. See also Harse *v.* Pearl Life Ass. Co., [1903] 2 K. B. 92; Cranson *v.* Goss, 107 Mass. 439; Miller *v.* Hirschberg, 27 Oreg. 522; Millward *v.* Littlewood and note, *ante*, p. 934 and 3 Williston, Contracts, § 1631.

abundantly secured, and were wise and prudent investments of the funds of the company. The presiding justice of the Superior Court, who heard the case without a jury, has found that, although the loans were in form loans upon the notes of Sidney W. Burgess, Benjamin F. Burgess was in fact the borrower of the funds of the corporation; and that said Benjamin F. Burgess took no part, on behalf of the corporation, in the transactions in which said loans were made.

For the purposes of this discussion, we treat the case as if the loans had been made in form and directly to Benjamin F. Burgess. We do not understand the plaintiffs to contend that the defendant is affected with the knowledge of Burgess of the fraud in the transfer of the bonds in dispute. Upon this point the case of Innerarity *v.* Merchant's National Bank, 139 Mass. 322, is conclusive against them. But they contend that the contract between Burgess and the defendant was illegal and void; and that the defendant cannot retain the bonds which were given as security for the void contract.

This is the vital question in the case. The statute provides that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same, or be surety for such loans to others, or directly or indirectly be liable for money borrowed of the company." Pub. Sts. c. 119 § 47.

It is a rule universally accepted that, if a statute prohibits a contract in the sense of making it unlawful for any one to enter into it, such a contract, if made, is wholly void, and cannot be enforced. But it is often a difficult question to determine whether a statute forbidding an act to be done, or enjoining the mode of doing it, is prohibitory, so as to make any contract in violation of it absolutely void, or whether it is directory in its purpose, and does not necessarily invalidate the contract. Though it may be impossible to formulate a rule which will reconcile all the adjudications, yet the decisions recognize a clear distinction between these two classes of cases. There is a large class of cases, both in this country and in England, in which statutes have enacted, in substance, that goods should only be sold in certain measures, or in a certain manner, or after being inspected and branded by public officers; and it has been held that contracts of sale which do not meet the requirements of such statutes are absolutely void. The purpose of such statutes is to protect the buyer from the imposition of the seller, a purpose which would be wholly thwarted unless the contracts are held void, and therefore the intention of the legislature to make them void is inferred. Miller *v.* Post, 1 Allen, 434, and cases cited; Libby *v.* Downey, 5 Allen, 299; Sawyer *v.* Smith, 109 Mass. 220, and cases cited; Benjamin on Sales, § § 530 *et seq.*

So statutes prohibiting any work on the Lord's day, except work of necessity or charity, have been construed to make entirely void

any contract made in violation of their provisions. On the other hand, there are numerous cases where statutes forbid certain acts to be done, and in a sense forbid certain contracts to be made, and yet it is held that contracts made in contravention of the statutes are not void. When usurious contracts were forbidden by our laws, under a penalty of forfeiting threefold the amount of interest reserved or taken, the act of making such a contract was illegal, but the contract was not void. The imposition of the defined penalty showed that the legislature did not intend that the contract should be wholly void, as this would be imposing an added penalty. Merrill *v.* McIntire, 13 Gray, 157.

In Larned *v.* Andrews, 106 Mass. 435, it was held that the provisions of the internal revenue laws of the United States, prohibiting any persons from carrying on the business of wholesale dealers in merchandise until they should have paid the special tax therein provided for, did not invalidate sales made by persons who failed to comply with the statute, or prevent them from recovering the price of the goods sold. The same point was decided in Aiken *v.* Blaisdell, 41 Vt. 55.

The Revised Statutes of the United States respecting national banks provide that a bank shall not lend to any one person, corporation, or firm a sum exceeding one tenth part of the capital stock actually paid in, and that national banks shall not take real estate as collateral security except for debts previously contracted; and it has been repeatedly held that contracts made in contravention of the statute are not void. Gold-Mining Co. *v.* National Bank, 96 U. S. 640; National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99; Reynolds *v.* Crawfordsville National Bank, 112 U. S. 405.

Where the officers of a savings bank invest its funds in a manner forbidden by statute, such illegal action of the officers does not impair the validity of the investment. Holden *v.* Upton, 134 Mass. 177.[1]

Many other cases might be cited, in which it has been held that contracts made in violation of the provisions of statutes are not void, upon the ground that the statutes are intended merely to be directory to the officers or persons to whom they are addressed, and not to be conditions precedent to the validity of contracts made in reference to them. Each statute must be judged by itself as a whole, regard being had, not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purposes of the

[1] Similar decisions under various banking laws are: Savings Bank *v.* Burns, 104 Cal. 473; Union Mining Co. *v.* Rocky Mountain Nat. Bank, 1 Col. 531; Boltz *v.* National Bank, 158 Ill. 532; Benton County Bank *v.* Boddicker, 105 Ia. 548; Lester *v.* Howard Bank, 33 Md. 556; Allen *v.* First Nat. Bank, 23 Ohio St. 97; First Nat. Bank *v.* Smith, 8 S. Dak. 7; Wroten's Assignee *v.* Armat, 31 Gratt. 228.

statute, the inference is that it was intended to be directory, and not prohibitory of the contract.

The statute we are considering does not in terms prohibit the corporation from lending money to its officers, or declare that such contracts shall be void. It is directed to the officers, and, by its terms, seems intended to prescribe rules to regulate the duty of the officers to the corporation and its members. It does not say that the corporation shall not lend, but that the officers shall not borrow. In the words of Lord Mansfield, in Browning *v.* Morris, 2 Cowp, 790, 793, the statute itself "has marked the criminal." It is designed to forbid officers, who are charged with the duty of investing the funds of the corporation, borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy-holders from the dishonesty or self-interest of the officers. It is intended as a shield to the corporation. To construe it as making the promises of the officers who borrow money in violation of its provisions void would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the corporation for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction.

The plaintiffs contend that, unless the contract is held void, the statute is rendered nugatory. But this is not so. If the investing committee loans to an officer in violation of the duty imposed by the statute upon it, all who participate in the act would be liable for all losses occasioned thereby, and thus the main purpose of protecting the policy-holders would be subserved. The plaintiffs rely much upon the case of Albert *v.* Savings Bank, 2 Md. 159. But that case, if not overruled, is very much shaken as an authority by the more recent case of Lester *v.* Howard Bank, 33 Md. 558, which supports the views of the defendant.

For the reasons stated, we are of opinion that the notes signed by Sidney W. Burgess are valid contracts, which can be enforced by the corporation. This being so, we see no ground upon which it can be held that the defendant is not entitled to hold the bonds which it received in good faith as collateral security for the notes. The bonds were negotiable or transferable by delivery, and the defendant took them for a valuable consideration, and without fraud. The plaintiffs contend that they were not taken "in the usual course of business," because the contract of borrowing by Burgess was illegal. The rule is often stated to be that, in order to hold such property against the true owner, the transferee must have taken it for a valuable consideration, in good faith, in the usual course of business, without notice of any want of title on the part of the party negotiating it. It is quite as often stated to be that the transferee

must have taken it *bonâ fide* and for value. Both have the same meaning, and the defendant is within either statement of the rule It gave value for the bonds; it took them in good faith, in the ordinary and usual course of a transaction of loaning money and taking collateral security, and without any notice, actual or constructive, that Burgess was not the owner, with full power to transfer them. As to the defendant, the loan was legal; and the fact that Burgess was violating his duty in borrowing the money does not take the transaction of pledging the bonds as collateral security out of the usual course of business, or tend to excite any suspicion in the defendant that the bonds were not his property.

We do not consider the fact of any consequence that the loans to Burgess were made in violation of the rule of the directors. This could not have more effect than a violation of the statute. Such a rule is a private regulation of the directors, and its violation or evasion could not affect the validity of the loans.

Judgment for the defendant.[1]

NATIONAL BANK AND LOAN COMPANY *v.* PETRIE

United States Supreme Court, February 24–March 9, 1903

[*Reported in* 189 *United States,* 423]

Holmes, J. This is an action to recover money paid to the plaintiff in error for certain bonds. One defence set up in the answer was that the bank was a national bank, and that the sale of the bonds was without the authority of the bank, and was illegal and void. Judgment went against the bank; it was affirmed by the appellate division of the Supreme Court, 46 App. Div. 634, and by the Court of Appeals, 167 N. Y. 589, and the case now comes here by writ of error. The ground of the action is that the sale was induced by false representations of the president of the bank. We do not state these particularly, because the findings and rulings of the State court with regard to them are not open. We have to deal with no question except the defence attempted under the United States statute, and therefore need not inquire whether they contained a stronger infusion of fraud than is allowed to vendors in the way of praising their wares.

As we are of opinion that the defendant in error is entitled to keep his judgment, it does not matter so much as otherwise it would whether the result is reached by a dismissal of the writ, on the intimation of Walworth *v.* Kneeland, 15 How. 348, 353; see Conde *v.*

[1] Ohio Life Ins. & Trust Co. *v.* Merchants' Ins. & Trust Co., 11 Humph. 1, *acc.* See further, 3 Williston, Contracts, § 1632.

In this connection may well be considered many decisions in regard to contracts of foreign corporations forbidden by law to enter into such contracts. *Ibid.*, § 1771 *et seq.*

York, 168 U. S. 642, 649, or by an affirmance of the judgment. We shall assume that the defence under the statute was such a claim of immunity as to entitle the plaintiff in error to come here. Logan County National Bank *v.* Townsend, 139 U. S. 67, 72; McCormick *v.* Market Bank, 165 U. S. 538, 546. On that assumption, however, we do not perceive how the defence is made out on the record. The complaint, to be sure, alleges that the bank was acting unlawfully in selling the bond, but it does not appear that Petrie knew the fact, and it would be a strong thing to charge him with notice or a duty to make inquiries as to how the bank was conducting its business, or to make the validity of the sale depend upon the fact alone, irrespective of the purchaser's knowledge. See Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 578, 579; New York & New Haven Railroad *v.* Schuyler, 34 N. Y. 30, 73; Madison & Indianapolis Railroad *v.* Norwich Saving Society, 24 Ind. 457, 462. The sale might have been lawful. It was not necessarily wrong. First National Bank of Charlotte *v.* National Exchange Bank of Baltimore, 92 U. S. 122, 128. However, we need not stop at this preliminary difficulty or another suggested by the answer, on which no point was made. The answer alleges that the sale was without the authority or consent of the bank, and was not within the course of its regular business, which looks a good deal like an attempt to deny that there ever was an effective sale and yet to keep the price.

The declaration goes upon a recission of the contract. It contains ambiguous language, but the allegations of tender of the bond and that the tender still is kept good make the ground sufficiently clear. The question then is, leaving on one side the averment just quoted from the answer, and assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from withdrawing from the bargain on the ground of preliminary fraud. If the withdrawal were on the ground of repentance alone the law might, or might not, leave the parties where it found them. See Central Transportation Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 60, 61; Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 150. But a person does not become an outlaw and lose all rights by doing an illegal act. See Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that which the other had been content, has lost his right to object because he brought about the other's

consent by wrong. See Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 151. It is true that the fraud was perpetrated by an agent, and it is argued that he did not represent the bank for an illegal act. But unless this means that there was no sale, as the answer and a part of the argument seem to suggest, in which case, of course, Petrie must have his money back, the answer is that if the bank relies upon the sale it must take it with the burden of the fraud. It must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest. Cases where the action is on the illegal contract do not apply. Such was First National Bank of Allentown *v.* Hoch, 89 Penn. St. 324. Here the attempt is to recover outside of it, treating it as set aside. An action for damages caused by fraudulent representations which induced a contract, affirms the contract and relies upon it, Whiteside *v.* Brawley, 152 Massachusetts, 133, 134, and therefore may be subject to the same defences as an action brought directly upon the contract. Weckler *v.* First National Bank of Hagerstown, 42 Maryland, 581, 595, 597, seems to have been an action of this character in rsepect of a sale on commission by the bank. We express no opinion as to an action of that kind. See Thompson *v.* Saint Nicholas National Bank, 146 U. S. 240, 251; Concord First National Bank *v.* Hawkins, 174 U. S. 364. But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made. The record discloses no error re-examinable here.

Judgment affirmed.

KING *v.* KING, Executor, et al.

Ohio Supreme Court, November 27, 1900

[*Reported in* 63 *Ohio State,* 363]

Error to the Circuit Court of Cuyahoga County.

The plaintiff in error was the plaintiff below. Her action was to recover for personal services rendered in the performance of a contract made with James Howland in 1881, whereby she agreed to live with him and take care of him during his life. He was a man of means, well advanced in years, without family, living on Euclid Avenue in Cleveland, and much of the time in ill health. The plaintiff was a daughter of his niece. She performed the contract on her part, the service extending from the year 1881 to 1896, when Howland died. The contract, as stated in the petition, was that "this plaintiff agreed with the said James Howland that she would refrain from marriage while he should live, and that she would live with him and take care of him while he lived; and he, in consideration thereof, agreed that he would provide for her amply sufficient

to make her comfortable and well off." Howland in his will left to plaintiff a legacy of five hundred dollars, but, save small amounts of money given her from time to time, did not perform the contract. A recovery was had in the common pleas. The judgment was reversed by the circuit court because of error in the charge in instructing the jury that the contract was a legal one, and if proven to have been made as alleged, and duly performed by plaintiff, there might be a recovery. To reverse this judgment of reversal this proceeding is prosecuted.

John F. Clark and *Geo. L. Phillips,* for plaintiff in error.

Smith & Blake and *Marvin & Sharpe,* for defendants in error.

SPEAR, J. The sole ground of reversal is that the contract is void, because against public policy, being in restraint of marriage. Hence there could be no recovery. That contracts in restraint of marriage are void, as being contrary to the public policy of the law, is conceded. But the question here is whether the contract to render service, fully performed by the one party, so rests upon the promise not to marry, or is so tainted by that part of the agreement, as to be incapable of enforcement. The consideration moving to the agreement on the part of Howland to make ample provision for his niece was, on its face, twofold: one, the promise to perform the service agreed upon; the other, not to marry during the continuance of such service. The first was a valid promise and of itself sufficient to support the promise of the other party; the second was a void promise, not affording any consideration whatever. As given in text-books and numerous decisions, the general rule is that if one of two considerations for a promise be merely void, the other will support the promise, although if one of two considerations be unlawful, the promise of the other party is void; and yet this rule has many exceptions, as will be shown later on. That is, if one of two considerations is void merely for insufficiency, and not for illegality, the other will support the contract. Widoe *v.* Webb, 20 Ohio St. 435; Metc. on Con. 246; Chitty on Con., 988; 1 Parsons on Con., 456; Comst. on Con., 24; Pikard *v.* Cottels, Yelv. 56; Bliss *v.* Negus, 8 Mass. 51; Carleton *v.* Woods, 28 N. H. 290; Woodruff *v.* Hinman, 11 Vt. 592; King *v.* Sears, 2 C. M. & R. 48; Erie Railway Co. *v.* U. L. & E. Co., 35 N. J. L. 240; Bradburne *v.* Bradburne, Croke El. 149. This distinction between a contract merely void and an illegal contract would seem to be an important one. Courts, as a general proposition, are open for the enforcement of contracts, not for their destruction. So that, where parties have deliberately entered into a contract, valuable to them, and one has received the full advantage of it, the general policy of the law is to exact proper performance by him who has thus obtained the advantage, and some substantial defect should be shown before a court will refuse enforcement; a mere technical objection should not prevail. Now a void contract is one which has no legal force, and which, for that reason, cannot

be enforced; an unlawful contract is one to do an act which the law forbids, or to omit an act which the law enjoins, and for that reason is non-enforceable. There is no provision, either by statute or at common law, which enjoins upon any particular person the duty to marry, nor can any one be punished for not marrying. To marry, or not to marry, is left to the free choice of all who are eligible to marriage. Hence to omit to marry is not illegal, though the promise to omit is one which the law will not enforce. It would appear naturally to follow that the only result of making such a promise would simply be that no legal right could be founded on the promise and no remedy afforded for its breach. It is difficult to see any good reason for denouncing such contract as illegal in the sense of violating any law, or of placing parties who may have entered into it outside the pale of the law.

But, aside from this, in the present case the promise on the part of the woman which was of value to the man was the promise to care for him. The promise not to marry was a mere incident to the main purpose, entered into simply because it was supposed that, by remaining single, the woman could the better perform her contract. It was immaterial to the man whether she married or not so long as she fulfilled her promise as to care. In other words, the promise to remain unmarried did not enter into or become part of the substance of the general agreement; that agreement was for the performance of services. If the performance was adequate, and the services rendered in a satisfactory manner, their value could neither be enhanced nor diminished by the fact that they had been rendered by a single woman rather a married one; so that, had the plaintiff married, yet, if she satisfactorily performed her contract, the recipient of the services would lose nothing by the fact of marriage. As matter of fact she did not marry, whether because of the contract, or for reasons wholly apart from it, is not material, for she was under no obligation to marry nor to refrain from so doing. She did perform the service; that the verdict and judgment of the common pleas settles to all intents and purposes for the present inquiry. As above stated, the promise not to marry, although void because against public policy, was not illegal as against positive law, and it is not easy to perceive how its presence in the contract, or its performance by her, or both facts, could place the parties in what is termed *in pari delicto,* i. e., in a position where the law should adjudge them guilty of its violation, and hence refuse relief for that reason in the face of the fact that the claimant had fully performed.[1] In such case the maxim *in pari delicto melior est con-*

[1] The English courts formerly adopted a similar rule concerning contracts in restraint of trade, which has been thus summarised: "Although a person cannot bind himself to an unreasonable restraint of trade, yet if he submits to the restraint stipulated for as the consideration for a promise to pay an annuity, he may claim the payment whether the restraint be reasonable or unreasonable." Leake on Contracts (4th ed.) 516; Bishop *v.* Kitchin, 38 L. J. Q. B. 20. The same ruling was made

ditio possidentis, has, in reason, no application, and we think ought not to have application in law.

Courts refuse to enforce or recognize certain classes of acts because against public policy on the ground that they have a mischievous tendency, and are thus injurious to the interests of the State, apart from illegality or immorality. A contract in restraint of marriage is of this nature. But, as before suggested, it does not follow that all contracts which may have an element of insufficiency, and may be void as to one feature, are incapable of enforcement, or even that all that are illegal will not be enforced. Decisions are abundant in support of the proposition that even where the acts of the parties have been in violation of positive law the contract may, under some circumstances, be enforced. A case in point is Lester *v.* The Bank, 33 Md. 558. The bank's charter forbade a director, under penalty of fine and imprisonment, to borrow money from the bank. It was claimed that the act of thus lending by the bank was null and void; that no rights could accrue from it, and hence no action could be had by either party based upon it. The Court held, however, that: "Contracts made in violation of statute, are not necessarily incapable of enforcement because of their illegality. Whether the courts will enforce them or not, is a question of public policy, and they will be enforced when it may be adjudged that such policy requires their enforcement." Robinson, J., in the opinion, remarks that: "Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted not for the benefit of parties but of the public. It is evident, therefore, that cases may arise, even under contracts of this character, in which the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy," and cites 1 Story's Eq. Jur., sec. 298. This policy of the law finds expression in our statutes authorizing the recovery back of money lost at gaming, and the decisions under them. See also, Burkholder's Appeal, 105 Penn. St. 31. To justify refusal of relief to the plaintiff, on the ground referred to, the court ought to be ready to hold that the public mischiefs would be greater by permitting a party to recover who had made and performed a contract otherwise well founded but embracing an agreement not to marry while in its performance, than by permitting the other party to have the full benefit of meritorious service for nothing, thus repudiating his agreements, all of which were legal and based upon at least one consideration entirely adequate and wholly lawful. We are not prepared to make such a holding, but are clearly of opinion that no mischiefs to the public would result from sustaining a right

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in Rosenbaum *v.* United States Credit System Co., 65 N. J. L. 255; but it would not be generally followed in the United States. Oliver *v.* Gilmore, 52 Fed. Rep. 562; Bishop *v.* Palmer, 146 Mass. 469; Clancey *v.* The Onondaga Salt Co., 62 Barb. 395; and probably is no longer law in England, Evans *v.* Heathcote, [1918] T. K. B. 418.

to recover in a case like the present comparable to those which would follow a contrary holding, one which would encourage the violation of contracts and the repudiation of just obligations after full value had been received.

Other phases of the case are argued by defendants in error. The printed record presented embraces only the question here treated. It is not the duty of the court to hunt through portions of the record not printed in the quest of other reasons why the judgment of the common pleas should have been reversed, and we decline to do so. *The judgment of the circuit will be reversed and that of the common pleas affirmed.*[1]

CHARLES A FOX *v.* GEORGE E. ROGERS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 14–July 2, 1898

[*Reported in* 171 *Massachusetts,* 546]

HOLMES, J. This is an action of contract to recover for laying a drain from two houses of the defendant to a private sewer in the street in front, for the purpose of draining the surface water of the cellars, and for no other purpose. The judge before whom the case was tried found for the plaintiff, and it is conceded that the finding was warranted unless "the maintenace of the present action is contrary to the policy of the law." The principal matter relied on is that the pipes within and outside the building were Akron earthenware pipes, and not cast-iron, as required for drain pipes by St. 1892, c. 412, § 125 (see also § 135, and Rev. Ord. Boston, 1892, c. 42, § 18); and that even if, as the plaintiff understood and still contends, these provisions do not refer to pipes intended only for surface drainage, yet the plaintiff took up and relaid a part of a private drain outside with which his pipes connected, which was a drain for sewage, and was within the statute and ordinance. It also is argued, with less confidence, we take it, that the plaintiff's work, or part of it, was plumbing within the meaning of the ordinances, and required a permit under said c. 42, § 16, and also could not be done lawfully except by a registered plumber. *Ibid.,* and see c. 17. And finally it is objected that whereas the plaintiff only had a permit to occupy a portion of the street, not exceeding twenty-five feet in length in front of the buildings, he did in fact open a different part of the street for fifty-eight feet, in breach of Rev. Ord. c. 43, § 57.

We shall not trouble ourselves about the construction of the statute and ordinances, because it does not follow that the plaintiff cannot recover if he broke them. There is no policy of the law against the plaintiff's recovery unless his contract was illegal, and a con-

[1] Fletcher *v.* Osborn, 282 Ill. 143, *acc.*

tract is not necessarily illegal because it is carried out in an illegal way. Barry *v.* Capen, 151 Mass. 99, 100. The judge was warranted in finding that the defendant employed the plaintiff to build a suitable drain, and left all details to the plaintiff's discretion, simply promising to pay for the job when finished in consideration of the plaintiff's promise to do it, — a contract lawful on both sides. It is true that the plaintiff declares on an account annexed, setting out every item of labor and materials, but no question was raised on the pleadings; and even taking the case according to the pleadings, many of the items would be good. If the contract was what we have supposed, it was good as a whole. The supposed illegal acts entered neither into the promise nor into the consideration. It was not necessary to prove them even for the purpose of showing that the drain was finished, and that the time for payment had arrived. Probably the plaintiff's acting in excess of his license would be immaterial after the work was done. It may be that if the pipes are not of the material required by law, they are liable to be taken up, or that in some way the fact might affect the plaintiff's recovery, if that question were before us. But the only question is the fundamental one whether we can say, as matter of law, that the contract was illegal, and that the plaintiff can recover nothing. That, in the opinion of a majority of the court, we cannot say. It is perfectly plain that parties did not intend to contract for anything illegal, and even if the contract had contemplated the specific items charged for, it may be that it could have been sustained, but on that we express no opinion. Favor *v.* Philbrick, 7 N. H. 326, 337 *et seq.* Waugh *v.* Morris, L. R. 8 Q. B. 202.

Exceptions overruled.

CHAPTER VII

DISCHARGE OF CONTRACTS

SECTION I

PAROL AGREEMENT TO DISCHARGE

CONIERS AND HOLLAND CASE

In the King's Bench, Trinity Term, 1588

[*Reported in* 2 *Leonard,* 214]

In an action upon the case upon assumpsit by Coniers against Holland the defendant pleaded, that after the promise, that the plaintiff had discharged him of it. And by Wray, Chief Justice, It is a good plea, and so it hath been often ruled, and it was late the case of the Lord Chief Baron, against whom in such an action, such a plea was pleaded, and he moved us to declare our opinions in Serjeant's Inn; and there by the greater opinion it was holden to be a good plea; for which cause the Court said to Buckley who moved the case that the plea is good, and judgment was entered accordingly.[1]

FLOWER'S CASE

About 1597

[*Reported in Noy,* 67]

A. borrowed £100 of F. and at the day brought it in a bag and cast it upon the table before F. and F. said to A., being his nephew, "I will not have it, take it you and carry it home again with you." And by the court that is a good gift by parol, being cast upon the table. For then it was in the possession of F. and A. might well wage his law. By the Court, otherwise it had been, if A had only offered it to F. for then it was chose in action only, and could not be given without a writing.

[1] Equitable grounds for rescission, such as fraud and mistake, are not within the scope of this book. Nor are questions of quasi-contractual recovery.

LANGDEN *v.* STOKES

IN THE KING'S BENCH, MICHAELMAS TERM, 1634

[*Reported in Croke Charles,* 383]

ASSUMPSIT. Whereas the defendant on the 2d April, 9 Car. I. (for such a valuable consideration), assumed to go such a voyage in such a ship, before the August following, and alleges a breach in the non-performance.

The defendant pleaded that before any breach the plaintiff, on the fourth of April at such a place, *exoneravit eum* of the said promise. Hereupon the plaintiff demurred.

Rolle, for the plaintiff, now alleged that this pleading a discharge without showing how, was not good; and he cited divers books, 22 Edw. IV. pl. 40, that *indemnem conservet,* or *exonerabit,* is no plea.

Maynard, for the defendant, argued to the contrary, that forasmuch as this was an action grounded on a promise by words, it may be discharged by words before the breach thereof; and therefore *exoneravit* generally is a good plea; and he cited for this The Year-Book, 3 Hen. VI., pl. 36.

All the court was of this opinion (*absente* Berkley). RICHARDSON, Chief Justice, said that he knew it had been so resolved divers times; and the rule was remembered, *eodem modo quo oritur, eodem modo dissolvitur.* Wherefore it was adjudged for the defendant, *quod querens nihil capiat per billam.*

EDWARDS *v.* WEEKS

IN THE COMMON PLEAS, TRINITY TERM, 1677

[*Reported in* 2 *Modern Reports,* 259.[1]]

ASSUMPSIT. The plaintiff declared that the defendant, in consideration that the plaintiff at his request had exchanged horses with him, promised to pay him five pounds; and he alleged a breach in the non-performance. The defendant pleads that the plaintiff, before any action brought, discharged him of his promise.

And upon a demurrer the question was, whether after a breach of a promise a parol discharge could be good. The case of Langden *v.* Stokes, Cro. Car. 383, 1 Sid. 293, was an authority that such a discharge had been good before the breach, namely: The defendant promised to go a voyage; the breach was alleged in non-performance; and the defendant pleaded that before any breach the plaintiff *exoneravit eum;* and upon demurrer it was held good before the breach. But here was no time agreed for the payment of this five

[1] Also reported in 1 Mod. 262.

pounds, and therefore it was due immediately upon request; and not being paid, the promise is broken, and the parol discharge cannot be pleaded.

And of that opinion was ALL THE COURT, and judgment for the plaintiff, *nisi*, &c.

Quære, If he had pleaded such a discharge before any request of payment, whether it had been good?[1]

[1] In King *v.* Gillett, 7 M. & W. 55, the plea to an action for breach of promise of marriage was that before any breach the plaintiff "absolved, exonerated, and discharged the defendant." On special demurrer it was urged that the plea should have alleged rescission by mutual assent. The plea was held good, however, on the strength of precedents in Rast. Entries, 685; Brown's Entries, 67 (folio); Hern's Pleader, 31, and early decisions. The court, however, said the question was merely as to a matter of form, for though the plea was good "yet we think the defendant will not be able to succeed upon it at *nisi prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be rescinding of the contract previously made."

Dobson *v.* Espie, 2 H. & N. 79, was an action for the breach of an obligation to pay a deposit to an auctioneer as security for future performance of a contract for the sale of property; the defendant pleaded leave and license. On demurrer the court held the plea bad as not equivalent to "exonerated and discharged," but the implication is clear that a plea in the latter form would have been held good, and one member of the court, Bramwell, B., not only said so, but expressed the opinion that even in its actual form the plea was good. On the authority of this decision it is stated in 1 Smith's Leading Cases (11th Eng. ed.) 350, (9th Am. ed.) 614, "A person bound by a contract not under seal may, before breach, be exonerated from its performance by word of mouth, without any value or consideration." So Byles on Bills (16th ed.) 311. See also May *v.* King, 12 Mod. 537, 538; Martin *v.* Mowlin, 2 Burr. 969, 979; Edwards *v.* Walters, [1896] 2 Ch. 157, 168.

In Foster *v.* Dawber, 6 Ex. 839, 851, Parke, B. said, however, "It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment." See also Anson on Contracts (10th ed.) 291. In this coutnry it is not probable that a contract right can be discharged before breach by parol without consideration. Collyer *v.* Moulton, 9 R. I. 90; Clark on Contracts, 608; Harriman on Contracts (2d ed.) § 505; 24 Am. & Eng. Encyc. of Law (2d ed.) 287. See also Purdy *v.* Rome, &c. R. R. Co., 125 N. Y. 209, and cases *infra* in regard to the discharge of obligations on negotiable paper. But see Robinson *v.* McFaul, 19 Mo. 549; Seymour *v.* Minturn, 17 Johns. 169, 175; Kelly *v.* Bliss, 54 Wis. 187, 191.

In Foster *v.* Dawber, it was held, in accordance with some early authorities, that the obligation of a party to negotiable paper might be discharged by parol without consideration, even after breach. (Compare White *v.* Bluett, 23 L. J. Ex. 36.) This doctrine was never adopted by American courts. Maness *v.* Henry, 96 Ala. 454; Scharf *v.* Moore, 102 Ala. 468; Upper San Joaquin Co. *v.* Roach, 78 Cal. 552; Rogers *v.* Kimball, 121 Cal. 247; Heckman *v.* Manning, 4 Col. 543; Adamson *v.* Lamb, 3 Blackf. 446; Denman *v.* McMahin, 37 Ind. 241; Carter *v.* Zenblin, 68 Ind. 436; Hanlon *v.* Doherty, 109 Ind. 39; Franklin Bank *v.* Severin, 124 Ind. 317; Shaw *v.* Pratt, 22 Pick. 305; Smith *v.* Bartholomew, 1 Met. 276; Bragg *v.* Danielson, 141 Mass. 195, Hale *v.* Dressen, 76 Minn. 183; Henderson *v.* Henderson, 21 Mo. 379; Irwin *v.* Johnson, 36 N. J. Eq. 347; Crawford *v.* Millspaugh, 13 Johns. 87; Seymour *v.* Minturn, 17 Johns. 169; Campbell's Est. 7 Pa. St. 100, 101; McGuire *v.* Adams, 8 Pa. St. 286; Kidder *v.* Kidder, 33 Pa. 268; Horner's App. 2 Pennypacker, 289; Corbett *v.* Lucas 4 McCord L. 323. See, however, Nolan *v.* Bank of New York, 67 Barb. 24, 34.

The draftsman of the American Negotiable Instruments Law copied the provision of the English Bills of Exchange Act, 45 & 46 Vict. c. 16, § 62 (see also Edwards *v.* Walters [1896] 2 Ch. 157), which enacted that a renunciation in writing either before or after the maturity of negotiable paper is effectual without consideration. Crawford, Negotiable Inst. Law, § 203. The general enactment of this statute now makes the previous American decisions no longer applicable.

TAYLOR *v.* HILARY

In the Exchequer, Hilary Term, 1835

[*Reported in* 1 *Crompton, Meeson & Roscoe,* 741]

Assumpsit. The declaration stated that in consideration that the plaintiff, at the special instance and request of the defendant, would allow one Henry Holt to have goods as he might want them, not exceeding in the whole £200, the defendant undertook and promised the plaintiff to guarantee the payment of such goods; and the plaintiff averred that he, confiding, &c., did afterwards, to wit, &c., sell and deliver to the said Henry Holt certain goods of great value, not exceeding in the whole £200; to wit, of the value of £190, as he the said Henry Holt did want them; of which the defendant afterwards, to wit, on, &c., had notice. Breach, that Henry Holt had not paid for the said goods, or any part thereof, nor had the defendant, although often requested, paid for the same, or any part thereof. Plea, that after the making of the promise and undertaking in that count mentioned, and before any breach thereof, to wit, on the day and year aforesaid, it was, at the special instance and request of the plaintiff, agreed by and between the plaintiff and defendant that the plaintiff should supply to the said Henry Holt £200 worth of goods as he should want them, and that such goods should be paid for at the end of three months, by a joint bill at four months accepted by the defendant; which agreement of the defendant he the plaintiff, before any breach of the promise and undertaking in the said count mentioned accepted, in full discharge of that promise and undertaking, and thereby then wholly released and discharged the defendant from the further performances of that promise and undertaking. Verification.

To this plea the plaintiff demurred; and alleged, as cause of demurrer, that there was no material difference between the agreement set out in the count and that set out in the plea, and that the

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A contract under seal, of course, cannot be discharged by parol without consideration. Irwin *v.* Johnson, 36 N. J. Eq. 347; Traphagen *v.* Voorhees, 44 N. J. Eq. 21; Tulane *v.* Clifton, 47 N. J. Eq. 351; Jackson *v.* Stackhouse, 1 Cow. 122; Albert's Ex. *v.* Ziegler's Ex., 29 Pa. 50; Horner's App. 2 Pennypacker, 289; Ewing *v.* Ewing, 2 Leigh, 337.

After breach, a simple contract obligation cannot be discharged by parol without consideration. Edwards *v.* Walters, [1896] 2 Ch. 157, 168; Westmoreland *v.* Porter, 75 Ala. 452; Florence Cotton Co. *v.* Field, 104 Ala. 471; Mobile &c. R. R. Co. *v.* Owen, 121 Ala. 505; Swan *v.* Benson, 31 Ark. 728; Mendell *v.* Davies, 46 Ark. 420; Metcalf *v.* Kent, 104 Iowa, 487; Shaw *v.* Pratt, 22 Pick. 305, 308; Averill *v.* Wood, 78 Mich. 342, 354; Young *v.* Power, 41 Miss. 197; Northwestern Nat. Bank *v.* Great Falls' Opera House, 23 Mont. 1; Landon *v.* Hutton, 50 N. J. Eq. 500; Whitehill *v.* Wilson, 3 Pen. & Watts, 405, 413. But see *contra*, Green *v.* Langdon, 28 Mich. 221.

In a few states, by statute or otherwise, a written acknowledgment by a creditor of receipt in full payment will discharge the debtor, though given without consideration. Stegall *v.* Wright, 143 Ala. 204; Dobson *v.* McDonald, 92 Cal. 33; Drefus *v.* Roberts, 75 Ark. 354; Johnson *v.* Cooke, 85 Conn. 679; Green *v.* Langdon, 28 Mich. 221.

only difference applied to the time of credit to be given; and that it did not appear by the said plea, but that the agreement therein mentioned had been fully carried into effect by the plaintiff, and the time of credit expired.

Barstow, in support of the demurrer.

Per Curiam. Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not, therefore, require an averment of performance.

FREDERICK THOMAS WEST, Surviving Executor of John West, *v.* JOHN BLAKEWAY

In the Common Pleas, April 29, May 4, 1841

[*Reported in* 2 *Manning & Granger,* 729]

Tindal, C. J.[1] This is an action of covenant brought by the surviving executor of the lessor, who was himself a termor, against the lessee, upon a covenant in the lease to yield up the demised premises at expiration of the term, together with all erections and improvements which, during the term thereby granted, should be erected, made, or set up, in or upon the said premises or any part thereof. The defendant, in his third plea, states that the interest in the lease vested in one Hicks, as assignee of the term, and that it was agreed between the lesser and Hicks that if Hicks would erect, make, and set up a certain erection or improvement, to wit, a greenhouse, in and upon the demised premises, during the continuance of the last-mentioned term, Hicks should be at liberty to pull down and remove such greenhouse at the expiration of that term, provided no injury was done to the demised premises in and about the removal of the greenhouse. It being found by the jury that the plea is true in fact, the question now arises whether it is good in point of law; and it appears to me, upon the best consideration I can bring to that question, that the plea contains no legal answer to the declaration. If the lessor had occasioned the breach, that would have been the answer to the complaint founded on that breach, not on the ground of an agreement, but because the act complained of would have been the act of the lessor himself, and not, as charged, the act of the lessee. The lessee might have said: This was your own act, and therefore you are not damnified. But this plea ap-

[1] Bosanquet, Coltman, and Erskine, JJ., delivered concurring opinions. A portion of the case holding the greenhouse in question an "erection or improvement" within the meaning of the lease is omitted.

pears to me to set up that which is merely a parol license. Now it is a well known rule of law that *unumquodque ligamen dissolvitur eodem ligamine quo ligatur.* This is so well established that it appears to me unnecessary to refer to cases. I will mention only Rogers *v.* Payne, 2 Wils. 376, which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held, upon demurrer, that the covenant could not be discharged without a deed; and Blake's case, 6 Co. Rep. 43 *b*, was cited. Now if an action had been brought against the assignee, to have set up this defence would have been in direct violation of the rule to which I have adverted. How can it be an answer for the lessee if not for the assignee? Cases of conditions which have been waived, or the performance of which has become impossible, do not, I think, apply. No doubt in the case of a bond, if the breach be occasioned by the obligee, or if the performance of the condition be rendered impossible by his act, no forfeiture is incurred. Though the bond, however, is under seal, the condition is of a thing resting on evidence only. It may be compared to a matter *in pais.* But in the case of a covenant the whole matter is under the seal of the party; and the contract into which he has entered can be discharged only by an instrument of the same nature as that by which the contract was created. If it could be maintained, as was contended on the part of the defendant, that the third plea disclosed an act which the lessor had done, or which he had compelled to be done, I think it would have been good. It would have been like the well-known plea of "damnified by his own default." But that does not appear to me to be the true construction of this plea; and I think that the rule for entering up judgment *non obstante veridicto* must be made absolute.[1]

[1] In Yockey *v.* Marion, 269 Illinois. 342, 348 the court said:

"As a matter of law, the contract, being under seal and not being cancelled, destroyed or surrendered, remained in force. A sealed executory contract cannot be altered, modified or changed by parol agreement, although it may be surrendered and canceled by an executed parol agreement. (Alschuler *v.* Schiff, 164 Ill. 298; Brettmann *v.* Fischer, 216 id. 142.) An executed parol agreement may be shown to defeat recovery upon an instrument under seal, and although the parol agreement may have been without consideration it may become a basis for an equitable estoppel, if by means of it one of the parties has been led into a line of conduct prejudicial to his interests if the contract should be enforced. The rule in equity also is that a party asking the court to enforce the specific performance of a contract will fail in his suit if a rescision or abandonment may be deduced from circumstances or a course of conduct. (Lasher *v.* Loefler, 190 Ill. 150)"

WILLIAMS *v.* STERN.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL,
December 19, 1879

[*Reported in* 5 *Queen's Bench Division,* 409]

ACTION in the Court of Passage at Liverpool to recover damages for the seizure and sale of the plaintiff's goods.

By an indenture, being a bill of sale, and dated the 9th of July, 1878, and made between the plaintiff (thereinafter called the mortgagor) of the one part, and the defendant (thereinafter called the mortgagee) of the other part, after reciting that the mortgagor had applied to the mortgagee for an advance of £30 and had agreed to pay the sum of £12 as a consideration for the same, and that the mortgagee had consented to make the advance upon having those sums secured in manner thereinafter appearing, it was witnessed that in consideration of £30 by the mortgagee paid to the mortgagor on the execution of the indenture, the mortgagor assigned to the mortgagee all the stock-in-trade, shop-fixtures, furniture, goods chattels, and effects of the mortgagor then being in the shop, dwelling-houses, and premises of the mortgagor, situate in Liverpool, to hold the said property unto the mortgagee to and for his own use and benefit, subject to a proviso for redemption in case the mortgagor should pay to the mortgagee the sum of £42 by twenty-five consecutive weekly payments of £1 5*s.* each on every Monday before noon, the first payment to be made on the 15th day of July instant, and the balance of £10 15*s.* on the 6th day of January, 1879. The indenture contained a covenant by the mortgagor with the mortgagee for the repayment of £42, and then contained the following declaration: "It is hereby declared and agreed that notwithstanding the aforesaid proviso for redemption it shall be lawful for the mortgagee at any time after the execution hereof to take possession of the said property and to retain such possession (either in and upon the said shop, dwelling-house, and premises, or in any other place to which the mortgagee may think fit to remove it) until all moneys payable under these presents, together with all expenses which may be incurred by the mortgagee in and about taking possession, removing, and retaining possession of the said property, shall be fully paid; and, further, that if default be made by the mortgagor in payment of any instalments of the sum of £42 . . . on the days on which such instalments respectively shall become payable, the whole amount which at the time of such default shall be secured by these presents and shall be remaining unpaid shall at once become due and payable; and thereupon it shall be lawful for the mortgagee to sell the said property by public or private sale and receive the moneys arising therefrom, and retain to him-

self thereout all moneys remaining due on the security of these presents and all expenses which he may have incurred in taking and holding possession and removing and selling the said property, and all costs and charges which he may have incurred in defending and maintaining his rights, powers, and authorities under these presents; and that the surplus (if any) of such moneys shall be paid to the mortgagor. . . . And it is hereby agreed and declared that it shall be lawful for the mortgagee and his agents from time to time during the continuance of this security to enter and remain upon the said shop, dwelling-house, and premises, or any other premises upon which the said property or any part thereof may be, for the purpose of taking and holding possession of the said property, or of there selling the same by auction or of removing the same, or for any other reasonable purpose in connection with these presents; and in case the mortgagee or his agents shall be unable to obtain admission in the usual manner, it shall be lawful for him to break open the outer and inner doors and the windows in order to obtain admission." The other provisions of the indenture were immaterial to this action. The plaintiff paid thirteen weekly instalments; but on the day when the fourteenth became due, he had to attend the Court of Passage as juryman; he called upon the defendant and asked for time; the defendant said that he would not look to a week. Relying upon this statement of the defendant, the plaintiff served as a juryman for three days, but on the third day the defendant seized the plaintiff's goods and sold them within the current week and before any fresh default had been committed by the plaintiff. It was alleged that the defendant had heard that the plaintiff's landlord intended to distrain upon the goods for rent in arrear. The judge asked the jury whether the defendant had so acted as to induce the plaintiff to believe that the defendant would hold his hand; the jury answered this question in favor of the plaintiff and assessed the damages at £80. The judge gave leave to move on the ground that there was no evidence of a waiver by the defendant. The Queen's Bench Division made absolute a rule for a new trial, but gave the plaintiff leave to appeal.

The plaintiff accordingly appealed.

F. W. Raikes, for the plaintiff.

D. French, for the defendant.

Bramwell, L. J. I think that this appeal must be dismissed. The plaintiff's evidence failed to show that the defendant had no right to seize his goods. When the plaintiff allowed the appointed time to elapse without paying the instalment, he was in default; whenever there is an omission to do an act pursuant to the terms of a contract, there is a default in the performance of it. It has been argued for the plaintiff that after the defendant had promised to wait for a week, he could not lawfully seize the plaintiff's goods; but I do not think that his promise was sufficient to prevent him

from putting in force the powers of the bill of sale; it was not an undertaking which bound him; the promise was not supported by any consideration. The plaintiff was not induced to alter his position. A promise to wait founded upon a good consideration would have prevented the defendant from seizing the goods comprised in the bill of sale, even though a distress by the plaintiff's landlord had been threatened. For the plaintiff reliance has been placed upon Albert *v.* Grosvenor Investment Co., L. R. 3 Q. R. 123; but I cannot accede to the decision in that case, because I entertain great doubts whether it was correct. That was a seizure upon an alleged default, and upon the facts before them the Court of Queen's Bench held that there had been no default. But whether that decision was right or wrong, in the present case there was no evidence of a valid waiver by the defendant; no benefit accrued to him from his promise. The appeal must be dismissed.

BRETT, L. J. I agree with the view of the law enunciated by Bramwell, L. J. I think that upon the true construction of the indenture the defendant was entitled at any time to take possession of the goods comprised in it. If, however, a default was necessary in order to enable the defendant to seize, I think that such a default had occurred; for "default" means simply the non-payment of money, and the plaintiff had failed to pay one of the instalments at the time when it became due. On behalf of the plaintiff reliance was placed upon the circumstance that the defendant had promised to wait for a week. This was not a misstatement as to existing facts; it was a mere naked promise, not binding upon the defendant. Has there been any misconduct on the part of the defendant? I think not: it appears that a distress by the plaintiff's landlord had been threatened; and under these circumstances I do not blame the defendant for changing his mind. In my opinion the decision in Albert *v.* Grosvenor Investment Co., L. R. 3 Q. B. 123, did alter the meaning of the words used by the contracting parties. I cannot agree with that decision. In this case there was no evidence to show that the defendant had waived any of his rights under the indenture, and the case ought to have been withdrawn from the jury. There must be a new trial.

COTTON, L. J. The only question before us is whether the indenture conferred upon the defendant a power to seize and sell the plaintiff's goods under the circumstances which actually happened. I agree that the plaintiff was in default when he failed to pay the instalment; for "default" simply means non-payment of a sum of money which is due. Did the alleged promise of the defendant prevent him from seizing and selling the plaintiff's goods? It was not founded upon any consideration. It seems to me that nothing rendered the seizure and sale wrongful. The defendant made no representation which operated to the plaintiff's disadvantage; he simply uttered his own private intentions; he gave no promise which

was enforceable in law. The plaintiff has no claim for relief in equity; before the Supreme Court of Judicature Acts, 1873, 1875, the Court of Chancery would not have interfered to set aside the seizure. *Appeal dismissed.*[1]

ALBERT WEBER, JR., Administrator, *v.* EDWARD F. COUCH and another

Supreme Judicial Court of Massachusetts, January 6–22, 1883

[*Reported in* 134 *Massachusetts,* 26]

Holmes, J. This is an action on a judgment for $1154.71, against Edward F. Couch and A. C. Couch, copartners. After that judgment was recovered, one of the defendants paid $100 upon it, and the following agreement was indorsed on the execution: "In consideration of the sum of one hundred dollars paid by Edward F. Couch, one of the within-named judgment debtors, I hereby release said Edward F. Couch from any and all liability on the said judgment, and acknowledge satisfaction of the within judgment so far as said Edward F. Couch is concerned, but reserve to myself the right to avail myself of certain securities, to wit, notes and mortgages in the hands of one A. H. G. Lewis, put up by one John Snow, of Providence, R. I., to release the attachment.

"Albert Weber. By Buckland & White, his attorneys."

The defendant E. F. Couch has died pending this action, but the other defendant insists that the above transaction discharged E. F. Couch, and therefore discharged him, the other joint debtor. To make out that E. F. Couch was discharged, the defendant suggests that the consideration of the dealing with him consisted of the securities mentioned as well as the money. But there is nothing outside of the instrument to countenance this suggestion, and the instrument itself expressly contradicts it. It states the consideration to be one hundred dollars and nothing else. It does not disclose the acquisition of any new rights in the securities by the plaintiff, or any change of position on the part of the defendant. Indeed, so far as appears, the defendant was a stranger to the securities, which were "put up by one John Snow." The defendant's argument therefore fails. A parol release of a judgment for money, in consideration of a payment of a smaller sum, is invalid at common law.

The defendant does not argue that the release had any greater effect because written on the execution, than it would have had if it had been written on any other piece of paper. It is still a parol release addressing itself directly to the judgment, which it is in-

[1] Compare Bacon *v.* Cobb, 45 Ill. 47; Watkins *v.* Hodges, 6 H. & J. 38; Franklin F. I. Co. *v.* Hamill, 5 Md. 170; Imperator Realty Co. *v.* Tull, (N. Y.) 127 N. E. 263; Wilgus *v.* Whitehead, 89 Pa. 131.

competent to discharge in that way. Neither can it have a greater indirect operation than it could have had directly. To that end it would be necessary first to read the release as purporting to discharge the execution, because it was indorsed on the writ, and because, if it had been effectual to discharge the judgment, it would have discharged the execution, and then, after providing this substituted machinery, to hold that the parol release of the execution was conclusive, and that the discharge of the judgment followed. This is impossible, and it is therfore unnecessary to consider what the effect of the indorsement would have been upon the liability of the other defendant if it had been valid; whether it would have discharged him apart from the reservations, and whether the reservations were sufficient to cut the words of release down to a covenant not to sue. *Judgment for the plaintiff.*[1]

SECTION II

NOVATION.[2]

ROE *v.* HAUGH

IN THE EXCHEQUER CHAMBER, TRINITY TERM, 1697

[*Reported in* 12 *Modern*, 133.[3]]

B. was indebted to A. in the sum of forty-two pounds, and C. in consideration *quòd* A. *accipere vellet ipsum* C. *fore debitorem ipsius* A. *pro quadraginta duob. lib. eidem A. per B. tunc debit, in vice et loco ejusdem* B. *super se assumpsit, et eidem* A. *promisit quòd ipse* C. *easdem quadraginta duas lib. eidem* A. *solvere vellet.* A. dies; his executors, on this promise, bring an assumpsit against C. averring in their count, that A. the testator trusting to the said promise of C. *accepit præd.* C. *fore debitorem ipsius* A. without saying anything that he discharged B. Non assumpsit pleaded; verdict and judgment for the plaintiff. Writ of error brought in the exchequer chamber.

The error insisted on was, that this is a void assumpsit, here being no good consideration; for except B. was discharged, C. could not be chargeable;

For which reason BLENCOWE, POWELL, and WARD were of opinion, judgment should be reversed; but POWIS, NEVILL, LECHMERE, and TREBY, that this being after verdict, they should do what they could to help it; to which end they would not consider it only as

[1] See also Bruce *v.* Anderson, 176 Mass. 161; Whitehill *v.* Wilson, 3 Pen. & Watts, 405.

[2] See the discussion of the subject by Professor Ames in 6 Harv. L. Rev. 184 and in 3 Williston, Contracts, § 1865 *et seq.*

[3] Also reported in 1 Salk. 29 and 3 Salk. 14.

a promise on the part of C. for as such it would not bind him, except B. was discharged; but they would construe it to be a mutual promise, viz. that C. promised to A. to pay the debt of B. and A. on the other side promised to discharge B. so that though B. be not actually discharged, yet if A. sues him, he subjects himself to an action for the breach of his promise. *The judgment was affirmed.*

WILFRED TRUDEAU *v.* LUCIEN POUTRE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, October 29, 1895–January 1, 1896

[*Reported in* 165 *Massachusetts,* 81]

CONTRACT. The plaintiff owned in partnership with one Picard the stock and fixtures in a drug store. The plaintiff sold his interest to Picard and took from the latter a note secured by mortgage on the stock. Later Picard sold the stock and fixtures to the defendant, and the plaintiff, as part of the transaction, at the same time, discharged Picard in order to enable Picard to transfer a clear title. The evidence was conflicting as to the promise, if any, made by the defendant to the plaintiff, but there was evidence that the defendant agreed to give two mortgages to secure part of the plaintiff's claim and agreed to pay the balance in cash.

The presiding judge directed a verdict for the defendant and the plaintiff alleged exceptions.

L. E. Wood, for the plaintiff.

J. W. Cummings (*E. Higginson & C. R. Cummings* with him), for the defendant.

MORTON, J. If the parties mutually agreed that the defendant should pay the plaintiff what Picard owed him, and the plaintiff accepted the defendant as his debtor in the place of Picard, and released Picard, the contract thus entered into would be valid and binding. Wood *v.* Corcoran, 1 Allen, 405. Lord *v.* Davison, 3 Allen, 131. Caswell *v.* Fellows, 110 Mass. 52. The release of Picard would constitute a sufficient consideration for the defendant's promise to the plaintiff. Caswell *v.* Fellows, *ubi supra.* And the promise declared on being an original undertaking and not a collateral one, and not including the giving of a mortgage by the defendant on his real estate, would not be within the Statute of Frauds. Lord *v.* Davison and Wood *v.* Corcoran, *ubi supra.* If there was no doubt as to the terms of the agreement, it would be a question of law for the court whether a substitution had been effected. Sinclair *v.* Richardson, 12 Vt. 33. But if the terms of the agreement were equivocal or uncertain, then it would be a question of fact for the jury, under suitable instructions. Sinclair *v.* Richardson, *ubi supra.* If the agreement of the plaintiff to release Picard and take the de-

fendant in his place was conditional upon the defendant's giving the mortgages, or such condition formed an essential part of it, then it is clear that there was no substitution, for the mortgages were not given. But if the defendant promised to pay the debt, and the plaintiff, relying on that, released Picard, so that if the defendant did not perform his agreement the plaintiff's only remedy would be an action against him for the breach of it, then the submission was complete, and Picard became entitled to a discharge of the mortgages which he and his wife had given to the plaintiff, the debt which they were given to secure having thus been cancelled and discharged. And it would not affect the plaintiff's right of recovery that the defendant also orally agreed to secure the plaintiff by a mortgage on his real estate. Rand v. Mather, 11 Cush. 1. Haynes *v.* Nice, 100 Mass, 327.

It was in dispute between the parties which of the two constructions indicated above should be given to the transaction; the defendant contending in substance that it should be the former, and the plaintiff the latter. There is language and there are circumstances and considerations consistent with either view; but there is nothing, we think, so clear as to enable us to say how the case should have been decided as matter of law.

Exceptions sustained.[1]

FAIRLEE *v.* DENTON & BARKER

IN THE KING'S BENCH, TRINITY TERM, 1828

[*Reported in* 8 *Barnewall & Cresswell,* 395]

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial the following facts appeared. The defendants had contracted to pay S. Crossland and J. Stonehouse £1,200 in six instalments at specified stages in the progress of certain buildings under construction by Crossland and Stonehouse. The defendants paid on orders from Crossland and Stonehouse £872 and being applied to for further advances, refused on the ground that the plaintiff had lodged in their hands orders signed by Crossland and Stonehouse for upwards of $200, and for these, they, the defendant, were responsible.

The plaintiff gave no evidence that at the time of this conversation the buildings were in such a state of forwardness as to entitle Crossland and Stonehouse to more than the £872 which they had already received, and from the defendants' evidence the contrary might be inferred.

LORD TENTERDEN directed a verdict for the plaintiff if they

[1] The statement of facts is abbreviated, and a portion of the opinion stating some of the evidence is omitted.

thought the defendant had ever acknowledged that they held in their hands money for the plaintiff. The jury found a verdict for the plaintiff, but a rule *nisi* for entering a nonsuit was obtained by Sir James Scarlett.[1]

F. Pollock and *R. V. Richards* now showed cause.

Sir J. Scarlett, and *Comyn, contra,* were stopped by the court.

Lord Tenterden, C. J. It is a general rule of law, that a chose in action cannot be assigned. There is, however, an exception to that rule. It has been held that where it has been admitted and agreed beyond dispute that a defined and ascertained sum is due from A. to B., and that a larger sum is due from C. to A., and the three agree that C. shall be B's debtor, instead of A., and C. promises to pay B. the amount owing to him by A., an action will lie by B. against C. Here, at the time when the defendants were supposed to have admitted that they were responsible to the plaintiff, there was not any defined and ascertained sum due from them to Crossland and Stonehouse. Crossland then asked the defendant for a further advance, which they refused, because they held orders in favor of the plaintiff for payment of more than £200. But non constat that that sum was then due from them to Crossland and Stonehouse. It might afterwards have been to become due in the progress of the work, which was not at that time completed. It lay upon the plaintiff, in order to bring himself within the cases which form exceptions to the general rule, to show that at the time when the defendants are supposed to have promised to pay him the debt owing to him by Crossland and Stonehouse there was a debt ascertained to be due to them from the defendants. Not having done so, he has not brought himself within the exception to the general rule, and therefore, the rule for a nonsuit must be made absolute.

Rule absolute.[2]

MOTT GLEASON *v.* DAVID FITZGERALD, Survivor, etc.

Michigan Supreme Court, April 19–May 28, 1895

[*Reported in* 105 *Michigan,* 516]

Grant, J. July 18, 1889, the defendants made a contract with the Chicago & West Michigan Railroad Company by which they agreed to lay and ballast the track between Baldwin and Traverse City. The work was to be done under the instruction and supervision of its chief engineer, whose decisions were to be final and conclusive on all matters of dispute. The defendants sublet this work

[1] The statement of facts has been abbreviated.

[2] Clark *v.* Billings, 59 Ind. 508, 509; Bristol Milling &c. Co. *v.* Probasco, 64 Ind. 406, 413; Rev. Civ. Code La. Art. 2186; Linneman *v.* Moross, 98 Mich. 178; Adams *v.* Power, 48 Miss. 450; Murphy *v.* Hanrahan, 50 Wis. 485, *acc.* Compare Cherry *v.* Jones, 41 Ga. 579; Torrey *v.* Grant, 18 Miss. 89; Courtois *v.* Perquier, 1 Brev. 314; Edwards *v.* Skirving, 1 Brev. 548.

to the firm of Lambert & Van Norman. The contract contained the following provision:

"That the said parties of the second part reserve the right to pay off the laborers who work for said first party under this contract, and the said party of the first part, for and in consideration of the sum of one dollar, hereby sells, releases, and assigns unto the party of the second part all moneys and sums of money due to laborers under this contract, and in execution of the same; *but it is expressly agreed that the party of the second part assumes no liability to the laborers who do work in execution of this contract, over and above the amount assigned by the party of the first part to the party of the second part, and not over and above the amount due and payable to the party of the first part.*"

Lambert & Van Norman continued for some time to work under the contract. A dispute arose between them, and Lambert & Van Norman finally abandoned it. Lambert & Van Norman, through their timekeeper, gave time checks to their workmen, certifying the number of days' work performed, the rate per day, the deductions, and balance due, and made payable at Hannah, Lay, & Co.'s Bank, at Traverse City, Mich. Lambert & Van Norman had no money at the bank with which to pay these checks. Plaintiff insists that he purchased these time checks, and made an arrangement by which the defendants agreed to pay them; that he released Lambert & Van Norman from liability; and that a complete novation was effected. It is insisted on the part of the defendants that a novation was not proven, and that before a novation could take place a valid indebtedness must be shown to exist between Lambert & Van Norman and the defendants.

It is not necessary, under the facts of this case, to determine whether the defendants were in fact indebted to Lambert & Van Norman. They had assigned to the defendants all moneys due from them to their laborers. If, therefore, the defendants had agreed to pay the plaintiff, and he had released Lambert & Van Norman, it is entirely clear that they could not defend upon the ground that they had in fact overpaid Lambert & Van Norman. The statute of frauds has no application to such case. The evidence on the part of the plaintiff tended to show that he made the agreement with defendants and Lambert & Van Norman, that defendants made the promise to pay with notice that Lambert & Van Norman were to be released, and that these time checks were in fact charged up against Lambert & Van Norman in an account rendered by the defendants. It is unnecessary to review the evidence at length. The question was fairly left to the jury, under proper and explicit instructions, and there was ample evidence to support their verdict. The case is controlled by Mulcrone *v.* Lumber Co., 55 Mich. 622.

Judgment affirmed.[1]

[1] Edenfield *v.* Canady, 60 Ga. 456; Bower *v.* Weber, 69 Iowa, 286, *acc.*

SECTION III

RELEASE

GIBBONS *v.* VOUILLON

IN THE COMMON PLEAS, November 16, 1849

[*Reported in* 8 *Common Bench,* 483]

WILDE, C. J. This question arises upon a plea which sets forth an agreement under seal between the defendant of the first part, three individuals named, as trustees, of the second part, and the plaintiff and certain other persons, creditors of the defendant, of the third part; and the plea, which is pleaded either as a bar to the action generally, or in bar of the further maintenance of the action, states that the defendant had carried on the business of a silk-mercer; that the several debts due to the parties of the second and third parts, which were set opposite to their respective names, had accrued; that the defendant was unable immediately to satisfy those debts; that, for the purpose of realizing his effects, it had been deemed advantageous to all the parties interested that the defendant should, for five years, be permitted to carry on the business, under the inspection of the trustees; and that it was agreed that the business should be so carried on for the said term of five years. The plea then goes on to state that in pursuance of the agreement the several persons parties thereto of the second and third parts by that indenture gave and granted unto the defendant until the 17th of May, 1848 (the indenture bearing date the 17th of May, 1843), full and free license and authority to pass and repass, &c.; and that it was further provided that, if any of the said persons, parties thereto of the second and third parts, should, at any time thereafter during the continuance of the license thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, the defendant should be released, exonerated, acquitted, and for ever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained should in any such respect be contravened, and of and from all manner of actions, suits, &c., by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly. The molestation or interference here mentioned must be intended to mean such sort of molestation and interference as the parties lawfully might resort to, having relation to their situtation as creditors and debtor. The question is, whether or not the effect may be given to this agreement

of the parties. Now, the first part of the deed operates as a letter of license, with a covenant on the part of the creditors not to sue within a limited time. This, it is contended, on the part of the plaintiff, cannot be pleaded in bar; but it is said, upon the supposed authority of Ford *v.* Beech, that the only remedy of the covenantee is by a cross action for damages.[1] Nothing, however, fell from the

[1] The arguments of counsel so far as they related to the question whether the release was a bar to the action, were as follows: —

Willes, in support of the demurrer. . . . The proviso in question being contrary to a rule of law, it cannot operate as a release. Assuming, as, indeed, was expressly held in Ford *v.* Beech, 11 Q. B. 852, that a covenant not to sue for a given time cannot be pleaded in bar, the question here will be, whether, the general intention of the parties being to keep alive the debt, any form of words the practical effect of which will be to prevent the creditor from suing within the time can be regarded. The foundation of the decision in Ford *v.* Beech was this, that if the deed barred or suspended the creditor's remedy for any period, however short, the effect would be a total release of the debt; and therefore the court construed the agreement as giving the defendant merely a right of action for breach thereof if the plaintiff sued while the payments were continued. [MAULE, J. — Is there anything to prevent a release from being made to operate *in futuro*, if the parties so intended? If that may be done, can more correct words be framed for the purpose than those here used?] It may be that this is good as a defeasance. [MAULE, J. — If it destroys the debt, it is a good answer to the action, by whatever name it may be called. V. WILLIAMS, J. — Is there any difference between a defeasance and a condition, except that the one is in the same, and the other in a different instrument? WILDE, C. J. — A covenant not to sue does not operate as a release. But here you have agreed that, if you do sue, a release shall come into operation. The mere addition of something as a consequence does not alter the legal operation of the instrument.] The effect of this deed, if it operates at all as a release, is to make it operate as an immediate release. [MAULE, J. — May there not be an effective stipulation to put an end to a debt?] That would be a defeasance, and it is not so pleaded. Either this must be taken to be an immediate discharge of the debt, or the court must say that the parties have attempted to do what cannot be done, namely, to suspend the debt for five years, and then revive it. [MAULE, J. — You are seeking to enforce a construction of the deed which is manifestly contrary to the intention of the parties. Is there any inconsistency in an agreement to suspend a present debt for a given period? WILDE, C. J., referred to Kearslake *v.* Morgan, 5 T. R. 513, and Stracey *v.* The Bank of England, 6 Bingh. 754; 4 M. & P. 639.] The case of a negotiable security is an exceptional case. James *v.* Williams, 13 M. & W. 828, 833. It would be unjust to the debtor to allow his creditor to sue him while the bill was outstanding. [WILDE, C. J. — Suppose the bill is not negotiable?] In that case it clearly operates no suspension. [MAULE, J. — If the thing which the parties agreed to do here may be done for one consideration, why may it not for another?] The principle upon which the cases proceed, is referable to the law-merchant. [MAULE, J. — The case of a bill of exchange is complicated with some difficulties. But is there anything unlawful in giving an extended credit for five years?] It is adding a new incident to a chose in action. A creditor cannot bind himself not to sue for a debt for a limited period, except by taking a negotiable security. In Stracey *v.* The Bank of England there was no suspension of the right of action. When once a right of action has accrued there is no mode by which the creditor's right can be got rid of, but accord and satisfaction, and release. [V. WILLIAMS, J. — Is it inconsistent with the character of a chose in action that, on the happening of a given event five years hence, the debt shall be discharged?] In that case there would be no suspension of the debt until the happening of the event contemplated. [V. WILLIAMS, J. — A legacy is in the nature of a chose in action. Suppose a legacy, with a condition that it should be void if the legatee filed a bill for it, — would that be bad?] Possibly not. [V. WILLIAMS, J. — In Cooke *v.* Turner, 15 M. & W. 727, such a condition in a devise of real estate was held to be valid.] A prospective right of action may be waived; as in King *v.* Gillett, 7 M. & W. 55, where, to a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it was held to be a good plea that, after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. Stracey *v.* The Bank of England is expressly overruled by Ford *v.* Beech. [WILDE, C. J. — It was not so

court in Ford *v.* Beach to countenance that supposition. Why is it that a covenant not to sue for a limited time cannot be pleaded in bar?

By reason of the rule that right to a personal action once vested, and suspended by the voluntary act of the party, for however short a time, is precluded and gone forever. It could only be pleaded in bar; for that is its legal operation. To have allowed the agreement in Ford *v.* Beach to be pleaded in bar as a release would have been obviously contrary to the intention of the parties; and no injustice followed from holding that the defendant's remedy for a breach was to be found in a cross action. But how does that apply where we have to deal with express and unequivocal words, and in a case where there are circumstances to warrant our concluding that the parties intended to give a totally different effect to the contract from what is before stated. Here we have to deal with a contract entered into in express terms between a debtor and a body of twenty or thirty creditors,

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intended: I wrote the judgment in Ford *v.* Beech; and I remember I had a very long discussion with one of my learned brothers upon it.] The plaintiff there clearly could have no right of action until he called for a transfer of the stock. In Thimbleby *v.* Barron, 3 M. & W. 210, it was held that a covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt, the learned counsel who there sought to uphold the plea being told by the court that the books were full of authorities against him. [TALFOURD, J. — The court of error, in Ford *v.* Beech, seem expressly to contemplate this case. Parke, B., in delivering the judgment, says: "In 1 Roll. Abr. 939, tit. Extinguishment (L), pl. 2, it is said, that, 'if the obligee grants to the obligor that he shall not be sued or vexed upon the said obligation before such a day, and, if he is, then that he shall plead the said grant as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release.' It must be observed that in that case it was expressly covenanted that in the event of the covenantor suing upon the obligation, contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release; the covenant in that case, therefore, went much beyond a mere covenant not to sue."] On referring to the passages in the Year Books, upon which Rolle founds himself, it will be found that the debt there is held to be gone at once. [TALFOURD, J. — Ayloffe *v.* Scrimpshire, Carth. 63, is an authority against you.] That case presents different aspects, according to the book in which it is reported. In the reports in Holt and in Shower, the deed is stated to have had the very same provision that is found here. [V. WILLIAMS, J. — Shower states as the principal case what Comberbach states as an illustration.] In Carthew it is somewhat differently reported; and the note at the end of the case — upon which, no doubt, reliance will be placed on the other side, — is evidently a mistake. [WILDE, C. J. — Carthew professes to be setting out the terms of the covenant, which the other reporters do not. MAULE, J. — Littleton, § 467, and the commentary thereon (Co. Litt. 274 *a*, 274 *b*), show that a man may release upon condition, though not for a limited period.] Littleton and Coke are there treating of rights other than rights of action. In Carivil *v.* Edwards, 1 Show. 330, it was held that to debt on bond by an executor, the defendant cannot plead in bar that the testator and other creditors of the defendant entered into a letter of license with him, in which they covenanted and agreed not to sue him within such a time, on pain of forfeiture; for it does not amount to a release of their debts.

Hugh Hill, contra. . . . It is then said that the covenant in question is not pleadable in bar to an action for one of the debts mentioned in the deed; but, at most, only gives ground for a cross-action, or for a bill in equity. The bringing of this action is not merely a violation of the covenant which the plaintiff has entered into with the defendant, but it is also a breach of faith with every one of the other creditors who were parties to the arrangement. It clearly, therefore, cannot be the subject of a cross-action, the damages in which would not be commensurate with the injury. A covenant between A. and B. not to sue for a limited time is not the proper subject of a

each of whom, for the benefit of the general concern, agrees that the debtor shall for a given period continue to carry on the business without molestation, and that, if that contract should be contravened by any creditor molesting or interfering with the debtor, such molestation or interference should operate as an extinguishment of the debt, and that the indenture might be pleaded in bar to such debt. How would it be possible to secure the object the parties had in view, if the effect could not be given to the agreement in the terms in which they have framed it? The intention is beyond doubt. A covenant not to sue for a given time enures as a release, not by the mere agreement of the parties, but by operation of law.

Then it is said that that which has occurred here is not a molestation within the meaning of the deed. Looking at all the circumstances it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their con-

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plea in bar; but if the deed declares the debt to be forfeited if sued for within the time, and enables the debtor to plead it, it does operate as a bar. This is distinctly laid down in 1 Roll. Abr. 939 tit. Extinguishment (L), pl. 1, 2: "Si l'oblige covenant ove l'obligor que est lie a performer covenants nemy a luy molester ou suer luy devant tiel jour, ceo nest ascun suspension del dett, car le proper sense del paroll est d'aver covenant sur ceo sil luy sue devant le jour, et nemy a faire ceo un reles. Si l'obligee grant al obligor quil ne serra sue nec vex sur le dit obligation devant tiel jour, et sil soit, que donque il pledera le dit grant come un acquittance, et que le dit obligation serra void et de nul effect, ceo est un suspension del obligation, et issint per consequens un reles, — car ceo est un grant, — et que il ceo pledera come un acquittance."

There is a singular diversity in the reports of Ayloffe *v.* Scrimpshire. In the reports in Carthew and in Salkeldit it is stated simply as a covenant not to sue for a limited time. In the former, the very case now before the court is put in the most pointed manner: "*Nota.* In the argument of this case it was allowed by all that a letter of license containing the words following, namely, that if the creditor sue, &c., within such a time, that his debt shall be forfeited, such license is pleadable in bar; therefore, in the principal case, the covenant being temporary and limited to a certain time, and there being no words in the deed of defeasance to make the debt forfeited upon a suit commenced, &c., the court was clear in opinion it was not pleadable in bar, but that an action of covenant was his proper remedy." In Comberbach the report runs thus: The defendant pleaded that the plaintiff, after the money was due on the bond, covenanted and granted by indenture not to sue the defendant in ninety-nine years; to which the plaintiff demurred. And Holt, C. J., said, "that the suspension of this action will not destroy the bond, for every defeasance is *quodammodo* a suspension; that a covenant not to sue at all is an acquittance, but a covenant not to sue a bond within such a time, goes only in covenant; that the rule that a personal action once suspended is forever extinct doth not hold in all cases." And Dolben agreed. Shower, in his report of Carivil *v.* Edwards, 1 Show. 330, concludes with an *adjournatur*, and he does not in his argument cite Ayloffe *v.* Scrimpshire, which occurred but two years before, and which as reported by himself, was, if correct, a distinct authority in his favor. Tatlock *v.* Smith, 6 Bingh. 339, 3 M. & P. 676, is a very strong authority in favor of the defendant. There, by an agreement between the defendants and their creditors, all the defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to the trustees a conveyance of all their estates, in which deed were to be inserted all other usual clauses. The trustees carried on the defendants' business, and paid the creditors 10*s.* in the pound; they then tendered for execution by the defendants a conveyance of all their estate, containing a clause of release which the defendants objected to as insufficient, and refused to execute the conveyance; the instrument not having been executed by all the creditors, a meeting at which the defendants were called on to execute was adjourned in order that the signature of every creditor might be obtained; and it was held that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue,

templation. When, therefore, this action—which in the ordinary course would go on to judgment and execution—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ.

The cases referred to in Rolle's Abridgment appear to me to afford distinct authority on the present occasion. We are to consider what is the effect of this deed, taking the whole of it together. On the part of the defendant, it is contended that the deed, taken altogether, operates as a release; and accordingly he pleads it in bar. The plaintiff's counsel, on the other hand, argues with much ingenuity that, if we hold it to be a release, we must hold it to be a release from the moment of its execution; and that is manifestly contrary to the intention of

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for their original debt, at least until the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. Richardson *v.* Rickman, B. R. M. 16 G. 3, is cited in Kearslake *v.* Morgan, 5 T. R. 517, as the first case in which it was held that the giving a negotiable instrument was pleadable in bar. In 2 Wms. Saund. 103 *b*, it is said: "It has been established by modern authorities that the acceptance of a negotiable note or bill 'for and on account' of a debt, must be taken *prima facie* to be in satisfaction of that debt, until it appears that the note or bill remains unpaid in the possession of the creditor, without any laches by him. Kearslake *v.* Morgan; Burden *v.* Halton, 4 Bingh. 454; 1 M. & P. 223; Kendrick *v.* Lomax, 2 C. & J. 405; Mercer *v.* Cheese, 4 M. & G. 804; 5 Scott, N. R. 664. It is usually said that the taking of the note or bill suspends the creditor's remedy for the time it has to run; for that it amounts to an agreement by him not to sue for that time in consideration of the debtor's giving the note or bill. See Simon *v.* Lloyd, 2 C. M. & R. 189; 3 Dowl. P. C. 813. It may be observed, however, that where the obligee of a bond even expressly covenants not to sue for a certain time, this cannot be pleaded in bar of an action on the bond, but is a covenant only, for a breach of which the obligor may bring his action. Ayloffe *v.* Scrimpshire, Carth. 63; 1 Show. 46; Comb. 123; 2 Salk. 573. And the reason seems to be, that if such covenants were allowed to operate in suspension of the action, the right of action would be altogether lost; inasmuch as it is a rule that where a personal action is once suspended by the voluntary act of the party, it is forever gone, and discharged. Fryer *v.* Hobart, 10; Dorchester *v.* Webb, Cro. Car. 372; Wankford *v.* Wankford, 1 Salk. 302, 303. In truth, then, this abeyance of the creditor's right to sue seems an anomaly which the law has admitted, as part of the law-merchant, in respect of mercantile securities. Owen *v.* Griffiths, Exch. T. T. 1844. The difficulty of reconciling the doctrine with any principle is increased by the courts' having declined to apply it to the case of a debt due for rent, — Davis *v.* Gyde, 2 Ad. & E. 623; 4 N. & M. 462, — or on a specialty. Worthington *v.* Wigley, 3 N. C. 454; 3 Scott, 558." [V. WILLIAMS, J. — Is not the plea an answer, as setting up a new agreement, as in Good *v.* Cheeseman, 2 B. & Ad. 328. That gets over the difficulty as to accord and satisfaction.] It is submitted that the plea may be upheld in that view also. [V. WILLIAMS, J. — Can there, in strictness, be a reservation of liberty to plead a thing in bar which is not a release? In Dean *v.* Newhall, 8 T. R., 168, it was held that if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. MAULE, J. — Here the proviso that in the event of molestation the covenant may be pleaded in bar seems designed merely to expound the former part, showing that it was intended in the sense in which it would furnish a bar.]

Willes, in reply. Good *v.* Cheeseman is altogether inapplicable to the view presented on the other side: this is not the simple case of a composition-deed. The passages cited from Rolle's Abridgment, as explained by a reference to the Year Books, show that the deed there supposed operated as an immediate release. Here, however, the plain and obvious intention of the parties was merely to suspend the remedy.

the parties. To extinguish the debt would manifestly be to defeat the whole intention of the deed. But upon what assumption is that ground taken? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given. I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The passage in Co. Litt. referred to by my brother Maule, seems to show that they may. There is, then, a clear and manifest intent, to be collected from the deed, that it shall operate as a release, from the happening of the event which the parties contemplated, namely, the molestation which has happened. It is no reason why effect should not be given to the clear intention of the parties that, in so doing, we necessarily carry its operation somewhat beyond what was contemplated.

For these reasons, I am of the opinion that the defendant is entitled to our judgment.[1]

SECTION IV

ACCORD AND SATISFACTION

BLAKE'S CASE

IN THE KING'S BENCH, MICHAELMAS TERM, 1605

[*Reported in* 6 *Coke*, 43 *b.*]

EDEN brought a writ of covenant against Blake, assignee of Price, and the breach was for not repairing of the house; the defendant pleaded an accord between him and the plaintiff, and the execution thereof in *satisfactione and exoneratione decasûs reparationûm predict'*, upon which the plaintiff demurred; which plea began in the Common Pleas, 3 Jac. Rot. 1033. And it was objected, that this action of covenant was founded on the deed, which could not be discharged but by matter of as high a nature, and not by any accord or matter *in pais;* for *nihil tam conveniens est naturali, ut unumquodque dissolvi eo ligamine quo ligatum est.* And it appears by all our books that neither arbitrament nor accord with satisfaction is a plea when the action is grounded on a deed. *Vide* 1 H. 7, 14 b., 33 H. 8, 51, 59 Dyer, 1 H. 5, 6, 7 (67) 45 E. 3, 46, 25 H. 8, Br. Det 173, 2. When the action is in the realty, or mixed with the realty, accord with satisfaction is no plea; for accord with satisfaction is a bar for the personalty, and not of the realty, and when the personalty is mixed with the realty, it is no bar for the personalty; for *omne majus trahit ad se minus.* Vide 11 H. 7, 13 b. 13 H. 7, 20 a, b, in Wast,

[1] V. WILLIAMS, J., delivered a brief concurring opinion and MAULE and TALFOURD, JJ., also concurred.

Cr. El. 357. So in a ravishment of ward, *Quare impedit, etc.* But it was resolved by the whole court that the defendant's plea was good in the case at bar; for there is a difference, when a duty accrues by the deed in certainty, *tempore confectionis scripti,* as by covenant, bill, or bond, to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty; but when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty for such wrong or default, accord with satisfaction is a good plea; as in the case at bar, the covenant doth not give the plaintiff at the time of the making of it any cause of action, but the wrong or default after in not repairing of the house, together with the deed, gives an action to recover damages for default of reparations. And forasmuch as the end of the action is but to have amends and damages in the personalty for this wrong, therefore amends and satisfaction given the plaintiff is a good plea. For the action is not merely grounded on the deed, but also on the deed and the wrong subsequent, which wrong is the cause of the action, and for which damages shall be recovered, as in 13 E. 4, 1 b, & 5a, b, in trespass, the plaintiff recovered by verdict, the defendant brought attaint against the plaintiff and petit jury, and one of the petit jury pleaded accord between the plaintiff and the defendant and satisfaction, and held a good plea. For the writ of attaint is not only grounded on the record, but on matter in fact also, for the supposition of the falsity in the oath is matter in fact. And in 35 H. 6, 30a, in attaint brought on false oath in appeal of Mayhem, one of the petit jury pleaded arbitrament between the plaintiff and the defendant; and in all cases where arbitrament is a good plea accord with satisfaction is a good plea. *Vide* 6 H. 7, 10a, b, acc'. And generally in all actions where damages only are to be recovered, arbitrament or accord with satisfaction is a good plea; as in an action of waste in the *tenuit,* where damages are only to be recovered; and so is the report of Serjeant Bendlowes to be understood; for, in an action of waste against lessee for years in the *tenet,* accord is no plea, as it hath been before said. So it is to be collected on the book of 35 H. 6, 30a, that in an appeal of Mayhem accord with satisfaction is a good plea, because in the same action damages are only to be recovered. And so is the general rule put in 6 E. 6 Dyer (2 Roll. Rep. 188, 9 Co. 78 a., Cr. Jac. 100), 75, in Andrews's case. *Vide* 47 E. 3, 20 b. Accord for a rent reserved on a lease for years, 7 E. 3, Issue 9, 10 H. 7, 4 a, 11 H. 7, 4.

ELIZABETH CASE *v.* JAMES BARBER

IN THE KING'S BENCH, TRINITY TERM, 1681

[*Reported in Thomas Raymond,* 450]

THE plaintiff declares in an *indebitatus assumpsit* for £20 for meat, drink, washing, and lodging for the defendant's wife, provided for her at the request of the defendant, and lays it two other ways. The defendant pleads that after making the said promise, &c., and before for exhibiting the said bill, viz., such a day, it was agreed between the plaintiff and the defendant, the one Jacob Barber his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife then in her custody, and that the plaintiffs should accept the said Jacob, the son, for her debtor for £9, to be paid as soon as the said Jacob should receive his pay due from his Majesty, as lieutenant of the ship called the "Happy Return," in full satisfaction and discharge of the premises in the declaration mentioned; and avers that the plaintiff the same time did deliver to the defendant the said clothes and that she accepted the said Jacob, the son, her debtor for the said £9, and that the said son agreed to pay the same to the plaintiff accordingly; and that the said Jacob afterwards, and as soon as he received his pay as aforesaid, viz., 27 April, 32 Car. 2, was ready and offered to pay the said £9, and the plaintiff refused to receive it; and that the said Jacob has always since been, and is still ready to pay the same, if the said plaintiff will receive it. *Et hoc paratus,* &c. The plaintiff demurs. And it is alleged by the defendant's counsel that the plea is good; for though in Peyto's case, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79 *b,* 3 Cro. 46, pl. 2, yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance; to which the court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given; and for this reason, Mich. 18 Car. B. R. Palmer *v.* Lawson, *ante.* In *indebitatus assumpsit* against an executor upon a contract made by the testator, the defendant pleads judgment in debt upon a simple contract against him for the debt of the testator, and after argument resolved a good plea; because, though in debt against an executor upon a simple contract the defendant may demur, yet when he admits the demand, and executors are now liable to pay such debts in action upon the case, the judgment so obtained was pleadable; so Vaughan, Rep. Dee *v.* Edgcomb.

But in this case at bar judgment was given for the plaintiff for two reasons:—

1. Because it doth not appear that there is any consideration that the son should pay the £9, but only an agreement without any consideration.

2. Admit the agreement would bind, yet now by the statute of frauds and perjuries, 29 Car. 2, this agreement ought to be in writing, or else the plaintiff could have no remedy thereon; and though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it, or he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

ALLEN *v.* HARRIS

IN THE COMMON PLEAS, MICHAELMAS TERM, 1701

[*Reported in* 1 *Lord Raymond,* 122]

TROVER for a waistcoat. The defendant pleads that the plaintiff, in consideration that the defendant at the special instance of the plaintiff assumed to pay the plaintiff 20*s.*, agreed to discharge the defendant of this trover, &c., and lays mutual promises to perform, &c. The plaintiff demurs. *Girdler,* sergeant, for the defendant. The old rule was, that an accord with satisfaction ought to be pleaded executed, that the plaintiff might be sure of something for his damages; but an arbitrament may be pleaded without performance, because the parties may have reciprocal remedies. Then it being now settled, that the parties may have actions upon mutual promises, this accord may be pleaded, though not executed, because each party may have his remedy. T. Jones, 158; Raym. 450, Case *v.* Barber; T. Jones, 168, Wickham *v.* Taylor. *Sed non allocatur.* For, *per curiam,* if arbitrament be pleaded with mutual promises to perform it, though the party has not performed his part who brings the action, yet he shall maintain his action; because an arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies.[1] And the books are so numerous that an accord ought to be executed that it is now impossible to overthow all the books. But if it had been a new point, it might be worthy of consideration.

Judgment for the plaintiff.

FORD *v.* BEECH

IN THE EXCHEQUER CHAMBER, Nov. 26, 1847–Feb. 3, 1848

[*Reported in* 11 *Queen's Bench,* 852]

THE verdict was entered up as directed in the preceding judgment; and judgment was entered on the record, with a *consideratum est,*

[1] Reeves *v.* Hearne, 1 M. & W. 323; Elliott *v.* Dazey, 3 T. B. Mon. 268, *acc.*

"that the plaintiff take nothing by his said writ, but that he be in mercy, &c., and that the defendant go thereof without day," &c., with costs for defendant against plaintiff, and award of execution thereof.

The plaintiff brought error in the Exchequer Chamber, assigning for error generally that judgment ought to have been given for the plaintiff, and also that judgment ought to have been given for the plaintiff "by reason of the non-performance by the said William Beech of the promise in the said third count of the said declaration mentioned; that the said finding of the said jury on the said eighth issue joined between," &c., amounts to a finding in favor of the said John Ford, and that judgment ought to have been given accordingly; that the said finding is imperfect, uncertain, and argumentative, and does not dispose of the whole of the said issue, and that no judgment can be given thereupon, or in respect thereof, or upon the said record and proceedings;" that the fifth and sixth pleas "are not, nor is either of them, sufficient to bar the plaintiff from having or maintaining his action as to the causes of action to which those pleas are respectively pleaded; that the said pleas show an accord only without satisfaction, or with only partial satisfaction; that the said pleas attempt to set up, as a defence to the causes of action to which they are pleaded, an accord and satisfaction by a stranger to those causes of action; that the said pleas attempt to set up, as an answer to the causes," &c., "the payment of a less sum than the amount which they profess respectively to answer." Joinder.

Pashley, for the plaintiff in error.

Unthank, contra.

Parke, B., in this vacation (February 3d) delivered the judgment of the court.

This is a writ of error brought to reverse a judgment of Her Majesty's Court of Queen's Bench. The first count is upon a promissory note, dated 28th May, 1839, made by the defendant, for the sum of £140 and interest, payable to the plaintiff twelve months after date; the second count is also on a promissory note, made by the defendant, for the sum of £200, payable with interest to the plaintiff, two years after date. It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant; and no question arises in respect of that judgment.

The defendant pleaded to the first count that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and the verdicts have been found upon them for the plaintiff. The defendant also pleaded, to both the first and second counts, that, after the making of the notes in those counts respectively mentioned, and after the same notes respectively became due, it was agreed between the plaintiff, the defendant, and one Alfred Beech that the said Alfred Beech should and would,

at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of £200, for her own sole use and benefit, or the sum of £25 per annum so long as the sum of £200 should remain unpaid, which sum of £25 should be paid quarterly as therein mentioned; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended as long as the said A. B. should continue to pay the said sum of £6 5s. every quarter; the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of £25 quarterly according to the agreement. The plaintiff in his replication to this plea traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of £25; and a verdict was found for the defendant upon the issue joined upon that traverse. And judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment, upon the ground that, *non obstante veridicto* upon the matters in that plea, judgment ought to have been given for the plaintiff upon the first and second counts. The plaintiff has brought his writ of error, praying for a reversal of this judgment.

And, upon the argument before us, the learned counsel for the plaintiff has contended that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied; but it has been insisted in the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action or power to sue for the recovery of the notes mentioned in the first and second counts in the declaration; and that the plea which sets up the agreement in bar of the present action is bad, and furnishes no answer to the action, although such an agreement may give the defendant a claim to damages by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments; and such agreement has therefore been well pleaded in bar. The question for the decision of the court is, therefore, what is the legal effect of the agreement between the parties set forth in the plea,—that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments, or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the extent of his suing contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied; namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties,

to be collected from the whole of the agreement, and that the greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. And applying this rule, the question is, what sense and meaning must be given to the word "suspended," used by the parties. It is quite clear that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and forever and in all events extinguishing the plaintiff's claim and demand upon the notes, and of ever maintaining an action for the recovery; or, in other words, that it should operate as a release of the money due upon them. This is plain from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well established principle of law that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in Platt *v.* The Sheriffs of London, Plowd. 35, 36: "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge forever." And in Lord North *v.* Butts, 2 Dyer, 139 *b*, 140 *a* (39), it is said: "A thing personal or suspended, or action personal suspended for an hour, is extinct and gone forever, when it is by the act and consent of the party himself who has the thing suspended." And in Woodward *v.* Lord Darcy, Plowd. 184, it is said: "For a personal action once suspended by the act or agreement of the party is always extinct; and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished:" The principle thus laid down is repeated throughout the text-books of authority, and recognized and applied through a long course of decision. And in Cheetham *v.* Ward, 1 Bos. & P. 630, 633, it is said by Lord Chief Justice Eyre that the principle is "now acknowledged that where a personal action is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes, and an extinction of the debt. It follows that giving such meaning and effect to the word "suspended," used in the agreement, would be contrary to the intention of the parties; and it is a well approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction.

A few authorities will suffice in support of this principle. In com-

menting upon Littleton, § 560,—where Littleton says, "If there be lord and tenant, and the tenant grant the tenements to a man for term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee," "the services are put in suspense during his life; but the heirs of the tenant for life shall have the services after his decease,"—Lord Coke, in 313 a says: "It is to be observed that, albeit a grant, as hath been said, may enure by way of release, and a release to the tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties, as here it should; for if by construction it should enure to a release, the heirs of the tenant for life should be disherited of the rent; and therefore Littleton here saith that the heirs of the grantee shall have the seigniory after his death." In the present case, if the agreement operates as a release by reason of a suspension of the right of action by the act of the party, it must be by a consequence of law, inasmuch as there is no express release; and in Co. Litt. 264 b, it is said: A release in law should be expounded more favorable, according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and shall be taken most strongly against himself." The general rules of law for the construction of instruments are clearly laid down by Wiles, C. J., in Parkhurst v. Smith, lessee of Dormer, Willes, 327, 332, and which is to the effect that greater regard is to be had to the intention than to the precise words; and this rule is said to have the authority of Littleton, Plowden, Coke, Hobart, and Finch. This principle is recognized and adopted by Gibbs, C. J., in Hutton *v.* Eyre, 6 Taunt. 289, 295, s. c. 1 Marsh. 603, 607; and it is also stated and applied by Dallas, C. J., and various authorities referred to, in Solly *v.* Forbes, 2 Br. & B., 38, 48, wherein he states, as the result of modern authority, that the courts look "rather to the intention of the parties than to the strict letter; not suffering the latter to defeat the former;" and he observes that, if a deed can "operate two ways, one consistent with the intent and the other repugnant to it, courts will be ever astute so to construe it as to effect to the intent," regard being had to "the entire deed;" and remarks upon the fallacy of assuming that, "wherever the word 'release' is made use of, it must operate absolutely and unconditionally," though followed by words of qualification.

Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made; and that the effect of such agreement on his part was, not to suspend his right of action in the mean time, but to subject him to an action for damages in the event of his suing contrary to his agreement.

The general doctrine of suspension of personal actions appears to be applicable to cases where persons have, by their own acts, placed themselves in circumstances incompatible with the application of the ordinary legal remedies; the cases generally referred to in the books being where the party to pay and to receive had become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be; such as a creditor making his debtor his executor, or debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue, as to which the authorities are numerous. See Co. Litt. 264 b, also Butler's note, ib. 209; Woodward *v.* Lord Darcy, Plowd. 184; Sir J. Needham's case, 8 Rep. 135 *a;* Dorchester *v.* Webb, Cro. Car. 372; Wankford *v.* Wankford, 1 Saik. 299; Freakley *v.* Fox, 9 B. & C. 130; 2 Williams on Executors, 1124 (4th ed.).

The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release (note (1) to Fowell v. Forrest, 2 Wms. Saund. 47 *gg*) for the reason assigned that the damages to be recovered in an action brought for suing contrary to the covenant would be equal to the debt (Smith *v.* Mapleback, 1 T. R. 441, 446) or sum to be recovered in the action agreed to be forborne. Accordingly in Deux *v.* Jeffries, Cro. Eliz. 352, in debt on obligation, the defendant pleads that the plaintiff covenanted that he would not sue before Michaelmas; it was resolved, upon demurrer, for the plaintiff, for that it was only a covenant not to sue and should not enure as a release, nor could be pleaded in bar, but the party was put to his writ of covenant, if sued before the time. "But if it had been a covenant that he would not sue it at all, there peradventure it might enure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release." And there are other authorities to the same effect. The agreement in the present case, though not under seal, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but cannot have a greater effect; and, in the modern case of Thimbleby *v.* Baron, 3 M. & W. 210, it was held that a covenant not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt. In that case the plaintiff had covenanted that he would not before the expiration of ten years demand or compel payment of certain sums of money, nor would take any means or proceedings for obtaining possession or receipt of the same. Lord Abinger, C. B., said: "The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar;" and Parke, B., said: "The books are full of authorities" against the defendant, and referred to Ayloffe *v.* Scrimpshire, Carth. 63, s. c. 1

Show. 46: judgment for plaintiff. In 1 Roll. Abr. 939, tit. Extinguishment (L), pl. 2, it is said that, if the obligee covenant not to sue the obligor before such a day, and if he do, that the obligor shall plead this as an aquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release. It must be observed that in that case it was expressly covenanted that, in the event of the covenantor suing upon the obligation contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release; the covenant in that case therefore went much beyond a mere covenant not to sue.

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but, by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross-action to recover damages to the extent of the injury sustained by the defendant by the plaintiff suing in breach of the agreement, no injustice is done to the defendant.

Nor is such a construction inconsistent with the class of authorities in which matters were allowed to be pleaded in bar in order to avoid circuity of action, because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions: Smith *v.* Mapleback, 1 T. R. 441, 446; which does not apply to the present instance, as the damages to which the defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payment, can in no view be assumed to be equal to the plaintiff's demand.

Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security payable in future for and on account of an antecedent demand cannot, until after such negotiable security has become due and been dishonored, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favor of the law merchant. See note (c) to Holdipp *v.* Otway, 2 Wms. Saund. 103 *b* (6th ed.).

The case of Stracey *v.* The Bank of England, 6 Bing. 754, was cited on the defendant's behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement, without operating as a release or extinguishment. But, upon examination, it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer, upon request, of certain stock to

which the plaintiffs were entitled; the defendant insisted that the plaintiffs had for good consideration agreed not to make such request until they had themselves done certain acts; and alleged that the plaintiffs, contrary to their agreement, made the request, for the non-compliance with which they brought their action, before they had done those acts; the defendants therefore contended that such non-compliance was no breach of duty on their part. There was no right of action suspended by the agreement, as it is clear for the case that no request had ever been made to the bank to transfer the stock, and no means had ever been given to enable the bank to do so, no name of a transferee having been given at the time when the agreement was made, nor for a long time afterwards; consequently the only right of action the plaintiffs ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was, not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendant to make a transfer until after he had done the acts mentioned in the agreement. And, although the expression of suspending an action was used, perhaps inaccurately, yet it was plain that they referred to the right to call for the transfer of stock, and to that only. At all events, as a decision upon the point for which the case was cited, it could not be supported, as it would be inconsistent without any undoubted principle of law and an undeviating course of authority.

In the result, we are of the opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it in favor of the defendant must be reversed, and a judgment entered for the plaintiff, *non obstante veredicto*, upon the confession and insufficient avoidance in the plea. *Judgment accordingly.*

SLATER *v.* JONES
CAPES *v.* BALL

In the Exchequer, April 28, 1873

[*Reported in Law Reports*, 8 *Exchequer*, 186]

Kelly, C. B.[1] I am of the opinion that the defendants in these actions are entitled to our judgment. The question raised in each is the same, and is whether a creditor is bound by a resolution to accept a composition to be paid by instalments or at a future time by a debtor, passed in conformity with the 126th section of the Bankruptcy Act, 1869, can sue the debtor for his whole debt before the time has come for the payment of any instalment, or of the composition.

[1] Martin, Bramwell, and Pollock, BB., delivered concurrent opinions.

Now, much stress has been laid upon the cases decided under the Bankruptcy Act of 1861; but there is a fundamental distinction between the provisions of that Act and of the present Bankruptcy Act. Under the former statute a prescribed majority of creditors could bind all to the provisions of any composition deed to which such majority should agree and all that the 192d section enacts is that the deed, whatever its provisions, should, upon certain conditions being complied with, bind all the creditors. The effect of each deed must of course be considered by itself. In one, provisions might be inserted amounting to an absolute extinction of the debt, in another, there might be no words having that effect; and if the intention of the parties was that the deed should be a bar, it was necessary to express it in plain words. That being so, I think the courts rightly decided that in construing those deeds the ordinary rules of law must be applied, and the intention of the parties be gathered from the words used; and, applying those rules, it was properly held that a deed which did not contain a release, or words equivilant to a release, could not be pleaded. Compositions are no longer carried out by deed, but by resolution; and we have to say what the true construction of the statute is. The matter depends upon the 126th section, which provides that the creditors may, by an extraordinary resolution, resolve, "That a composition shall be accepted in satisfaction of the debts due to them from the debtor." Could the legislature have intended that a creditor who has assented to, or is bound by the resolution, should the next day commence an action against the debtor for his whole debt? Such a construction seems to me to be repugnant to common sense, and certainly one which is not forced upon us by any of the decided cases. Here the creditors have become bound by a resolution that a composition to be paid by instalments, or at a future time, shall be accepted in satisfaction; and I think that a person who is bound by such a resolution is also bound, by necessary implication, not to sue the debtor before the time for payment comes, and until default is made. This construction receives confirmation from many of the cases cited, and especially from those referred to by my brother Bramwell, and collected in the second volume of Starkie on Evidence, p. 17, whence it appears that an agreement by all the creditors to accept a composition, though not properly an accord and satisfaction, is really a new agreement for which the consideration to each creditor is the forbearance of all the others. A creditor who is a party to such an agreement cannot sue for his original debt in contraventation of the rights of the others.

It remains to add a few words on the cases of Edwards *v.* Coombe, Law Rep. 7 C. P. 519, and *In re* Hatton, Law Rep. 7 Ch. 723. With regard to the latter, I do not dissent in any way from the decision. The general expressions used by MELLISH, L. J., must be taken *secundum subjectam materiem*; and do not seem to me to be applicable to a case where there has been no default in paying the agreed composi-

tion. The same remark is applicable to the judgment of WILLES, J., in Edwards *v.* Coombe, *supra.* Indeed, it is clear, from the language of the earlier part of his judgment, that he was of the opinion that no action could have been maintained until default.

Then it is contended that the case of Ford *v.* Beech, 11 Q. B. 852, 17 L. J. Q. B. 114, interposes an insurmountable difficulty in the defendant's way; for if the composition resolution is a good bar now, the right of action for the debt would be gone forever; and according to the decisions I have just referred to, it is clear that the right is not gone, but exists if the debtor makes default. Ford *v.* Beech, *supra,* however, has no application here. For all that it is necessary to decide is that although, *rebus sic stantibus,* the plaintiffs have no cause of action, in another state of circumstances a cause of action may accrue to them; and Edwards *v.* Coombe, *supra,* evidently contemplates that such may be the case. I see no difficulty, therefore, in holding that the present actions will not lie, although in a certain event the original debts might be sued for, just as a certificate in bankruptcy might be used as a bar to an action for the debt, and yet the same debt could afterwards be sued for if the certificate were set aside for fraud; or again, just as no action can be successfully brought for the price of goods for which a bill of exchange has been given whilst the bill is running, and yet the price can be sued for after the bill has been dishonored.

Judgment for the defendants in each action.[1]

[1] In Newington *v.* Levy, L. R. 5 C. P. 607, an action against the acceptor of a bill of exchange, the question was raised whether a composition deed, which provided for a future payment by the debtor and released him, but provided that if default were made in paying the composition the creditors should not be bound by any of their covenants, would operate as a defence if payment or tender of the amount of the composition were not made when it was due. WILLES, J., said: "We see no difficulty in upholding a release with a condition subsequent, in accordance with the suggestion of MAULE, J., in Gibbons *v.* Vouillon, 8 C. B. 487. It must have often happened that a voluntary payment good at the time as extinguishing the debt has been rendered void by matter subsequent, as in the event of bankruptcy of the debtor and an election by his assignees to treat the payment as a fraudulent preference; and it has never been successfully contended that the debt did not thereby revive. Indeed, the contrary is involved in the decision of Pritchard *v.* Hitchcock, 6 M. & G. 151. We can see no substantial distinction between the case of a payment avoided by subsequent events and a release so avoided. This is not a case of temporary suspension, like Ford *v.* Beech, 11 Q. B. 852; but a case in which the release will be forever operative, unless itself subsequently avoided. The distinction is fine, but it is supported by analogy, and it gives effect to the clear intention of the parties."

On appeal the Court of Exchequer Chamber affirmed the judgment below, L. R. 6 C. P. 180. BLACKBURN, J., said: "The first question that arises is, what is the effect of the release in the deed of composition pleaded in the first action? By that deed the creditors release the defendant from their respective debts in express terms: and in equally express terms it is declared that, if default should be made in payment of the composition, the release should be void. The question (which has never yet arisen in a court of error) is whether this is pleadable as a defence, where the matter which is to undo the release has not yet happened. I think it is. The old rule was that a right of action once suspended is gone forever. To avoid that, where it was evidently contrary to what the parties intended, the Court of Exchequer Chamber, in Ford *v.* Beech, 11 Q. B. 852, construed the agreement, not as suspending the plaintiff's remedy on the promissory notes there used upon, but as giving the defendant merely a right of action for breach thereof, if the plaintiff sued whilst the payments

HARBOR *v.* MORGAN

INDIANA SUPREME COURT, May 3, 1853

[*Reported in* 4 *Indiana,* 158]

STUART, J.[1] Assumpsit on a note due October 1, 1849, payable in money or wheat, at the customary price at Fairview, in said county. Breach, that the defendant had failed to pay the money, or in anywise comply with the conditions of said note.

The third plea alleges an agreement made in December, 1849, between Jernagan, the holder of the note, and the defendant below, to the effect that if Harbor would procure for the defendant a certain pacing horse which was specified, he, Jernagen, would accept, and receive the horse instead of the wheat, in payment of the note. And Harbor avers that he purchased the horse and sent him to Jernagen; but that the latter refused to receive him, &c.

This plea is also bad. It lacks the acceptance of Jernagan to make it a bar to the action.[2] Perhaps Harbor may have a remedy against Jernagan on the collateral agreement.

GOOD *v.* CHEESMAN

IN THE KING'S BENCH, May 4, 1831

[*Reported in* 2 *Barnewall & Adolphus,* 328]

ASSUMPSIT by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before LORD TENTERDEN, C. J., at the sittings in London after Trinity Term, 1830, it was proved, on behalf of the defendant, that

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were continued, that is, as a covenant not to sue for a limited period. It must, however, be taken to be established that, where a covenant not to sue is in terms expressed to be intended as a release, and where the rights of surety do not intervene, it is, in order to avoid circuity of action, an answer to the plaintiff's claim. A release which in terms is subject to a defeasance amounts to a covenant not to sue, except upon the happening of the event contemplated. Such a release is not open to the objection taken in Ford *v.* Beech, *supra.* It very rarely could happen that matter subsequent could undo that which had suspended the plaintiff's right of action, and therefore practically it was enough to say that a right of action once suspended is gone forever; and I am not surprised that the research of Mr. Williams has failed to enable him to find an instance of such a replication as this. But, where there is a covenant not to sue which is pleadable as a defence only to prevent a cross-action, anything which would have been an answer to the cross-action upon the covenant may be set up as an answer to the plea; as in the case of Eyton *v.* Littledale, 4 Ex. 159, 18 L. J. (Ex.) 369, where it was held to be a good replication to a plea of set-off, that after plea pleaded the plaintiff paid the debt." See also *ex parte* Burden, 16 Ch. D. 675.

[1] A portion of the opinion is omitted.

[2] Wray *v.* Milestone, 5 M. & W. 21; Gabriel *v.* Dresser, 15 C. B. 622; Francis *v.* Deming, 59 Conn. 108, Burgess *v.* Denison Mfg. Co., 79 Me. 266; Prest *v.* Cole, 183 Mass. 283; Cannon Rivers Assoc. *v.* Rogers, 46 Minn. 376; Hawley *v.* Foote, 19 Wend. 516; Keen *v.* Vaughan's Ex., 48 Pa. St. 477; Hosler *v.* Hurst, 151 Pa. 415, *acc.*

after the bills became due, and before the commencement of this action, the plaintiff and three other creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum: "Whereas, William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October, 1829." It did not appear whether or not the defendant was present when this paper was signed, nor did he ever sign it; but it was in his possesion at the time of the trial, and he had procured it to be stamped. At the time of the signature the defendant had other creditors than the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional 20*l.* per annum should be set apart by the defendant out of his income. The defendant, on the 16th of November, 1829, wrote to the plaintiff as follows: " If you should see Mr. Wooldridge" (one of the creditors who signed) "to-day, I should be glad if you would endeavor to be at my house at noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome; but, of course, I am anxious the thing should be settled." Gloge never acceded to the agreement, nor was any trustee ever nominated, or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The Lord Chief Justice left it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant, but leave was given to move to enter a verdict for the plaintiff. A rule *nisi* having been obtained accordingly,—

Scotland now showed cause.

Follett, contra

Lord Tenterden, C. J. Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that

this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is it not a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action where others have been induced to join in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such an engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor,—the consideration to each creditor being the engagement of the others not to press their individual claims.

LITTLEDALE, J. This is not strictly an accord and satisfaction or a release, but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney; if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from Heathcote *v.* Crookshanks, 2 T. R. 24. And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PARKE, J. I am of the opinion that the verdict was right. By the agreement entered into among these parties, the defendant was to give, and the creditors to accept, certain securities for payment in the manner there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in Com. Dig. Accord (B 4), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shown that the party suing had, so far as lay in him, fulfilled his own share of the contract.

I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

PATTERSON, J. The question is, whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith, which every one was induced to entertain, of a forbearance by all to the debtor. *Rule discharged.*[1]

BABCOCK & RUSSELL *v.* PETER HAWKINS

VERMONT SUPREME COURT, AUGUST TERM, 1851

[*Reported in* 23 *Vermont,* 561]

BOOK account. Judgment to account was rendered in the county court and an auditor was appointed, who reported the facts substantially as follows: The plaintiffs exhibited an account against the defendant, only one item of which was disputed, which was for a horse, charged by the plaintiff at $60, and which was allowed by the auditor at $52.50. The whole account was allowed by the auditor at $323.16. The plaintiffs exhibited credits to the amount of $285.87, which included a credit note for $30, given by the defendant to the plaintiffs August 14, 1849, and the defendant claimed and was allowed an account of 75 cents; and the auditor reported that there was a balance due from the defendant to the plaintiffs of $31.68, which they were entitled to recover, unless the facts hereinafter stated, which were relied upon by the defendant, would in law preclude the plaintiffs from any right of recovery. It appeared that on the 14th of August, 1849, which was subsequent to the commencement of this suit, the parties met, and the defendant agreed to give a note for $30 to the plaintiffs, and pay all the plaintiffs' costs in the suit, except the writ and service. The defendant executed the note,—which is the one credited to him by the plaintiffs as above stated,— and agreed to pay the costs as above stated; and the plaintiffs then executed and delivered to him a receipt in these words: "Received of Peter Hawkins thirty dollars by note given per this date in full to settle all book accounts up to this date;" and the suit, as well as the subject matter of the suit, was considered settled by the parties. The defendant never paid any portion of the costs, but paid part of the note, and for the reason that the defendant had not paid the costs the plaintiffs refused to discontinue the suit. The county court, February Adjourned Term, 1851, Poland, J., presiding, accepted the report and rendered judgment for the defendant. Exceptions by plaintiffs.

[1] Compare Evans *v.* Powis, 1 Ex. 601.

G. W. Stone and *J. McLean,* for plaintiffs.

T. Howard, for defendant.

The opinion of the court was delivered by

REDFIELD, J. There is perhaps no subject connected with the law upon which there has been more discussion than that of accord and satisfaction, or upon which there is more want of agreement. But we think it must be regarded as fully settled that an agreement upon sufficient consideration, fully executed, so as to have operated, in the minds of the parties, as a full satisfaction and settlement of pre-existing contract or account between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not, and that the party is bound to sue upon the new contract, if such were the agreement of the parties. This is certainly the common understanding of the matter. It is reasonable, and we think it is in accordance with the strictest principles of technical law.

1. There is no want of consideration in any such case where one contract is substituted for another, and especially so where the amount due upon the former contract or account is matter of dispute. The liquidating a disputed claim is always a sufficient consideration for a new promise. Holcomb *v.* Stimpson, 8 Vt. 141.

2. The accord is sufficiently executed, when all is done, which the party agrees to accept in satisfaction of the preexisting obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of the former securities, by release or receipt in full, or in any other mode. All that is requisite is that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the pre-existing liability in the present tense. That is shown in the present case by executing a receipt in full, the same as if the old contract had been upon note or bill and the papers had been surrendered.

3. In every case where one security or contract is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract. And in the present case, as it is obvious to us that the plaintiffs agreed to accept the note and the defendant's promise to pay the costs in full satisfaction, and in the place of the former liability, the defendant remained liable only upon the new contract.

4. In all cases where the party intends to retain his former remedy he will neither surrender nor release it; and whether the party shall be permitted to sue upon his original contract is matter of intention always, unless the new contract be of a higher grade of contract, in which case it will always merge the former contract, notwithstanding the agreement of the debtor to still remain liable upon the original contract.

5. In every case of a valid contract, upon sufficient consideration, to discharge a former contract in some new mode, the new contract supersedes the remedy for the time, until there has been a failure; and then the creditor may always, if he chooses, sue upon the new contract. This is certainly the inclination of the more modern cases.

We think the judgment must be affirmed.[1]

OTTO KROMER *v.* ANTON HEIM

NEW YORK COURT OF APPEALS, December 5, 1878–January 21, 1897

[*Reported in New York,* 547]

APPEAL from order of the General Term of the Superior Court of the city of New York, affirming an order of Special Term denying a motion on the part of the defendant to set aside an execution issued upon judgment herein, and to have the judgment satisfied of record.

On June 24, 1876, the plaintiff obtained a judgment herein for $4,334.08. On July 26, 1876, and pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, in and by which plaintiff agreed to accept in settlement of the judgment, if paid within a year, $3,000 in cash and an assignment of defendant's interest in a certain patent right and of the assets of such patent business, or to accept $1,000 in cash, $250 down and the balance in instalments, and merchandise to be delivered in amounts stated, sufficient, with cash payments, to reduce the judgment to $1,000, and an assignment of said patent interests. Defendant paid the $250 down, and made the other cash payments and deliveries of merchandise, as specified in the second alternative of the stipulation, until the judgment was reduced to less than $1,000, all of which payments were received by plaintiff without objection. Defendant then executed and tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept, but issued an execution to collect the balance of the judgment.

[1] The possibility of the executory accord being itself accepted as satisfaction is now generally recognized.

Evans *v.* Powis, 1 Ex. 601; Buttigieg *v.* Booker, 9 C. B. 689; Edwards *v.* Hancher, 1 C. P. D. 111, 119; Acker *v.* Bender, 33 Ala. 230; Smith *v.* Elrod, 122 Ala. 269; Heath *v.* Vaughn, 11 Col. App. 384; Warren *v.* Skinner, 20 Conn. 356; Goodrich *v.* Stanley, 24 Conn. 613; Brunswick, &c. Ry. Co. *v.* Clem, 80 Ga. 534; Simmons *v.* Clark, 56 Ill. 96; Hall *v.* Smith, 10 Iowa, 45, 15 Iowa, 584; Whitney *v.* Cook, 53 Miss. 551; Yazoo, &c. R. Co. *v.* Fulton, 71 Miss. 385; Worden *v.* Houston, 92 Mo. App. 371; Gerhart Realty Co. *v.* Northern Assur. Co., 94 Mo. App. 356; Frick *v.* Joseph, 2 N. Mex. 138; Perdew *v.* Tillma, 62 Neb. 865; Morehouse *v.* Second Nat. Bank, 98 N. Y. 503; Nassoiy *v.* Tomlinson, 148 N. Y. 326; Spier *v.* Hyde, 78 N. Y. App. Div. 151. Compare Campbell *v.* Hurd, 74 Hun, 235; Wentz *v.* Meyersohn, 59 N. Y. App. Div. 130; Hozler *v.* Hursh, 151 Pa. 415.

D. M. Porter, for appellant.

J. W. Feeter, for respondent.

ANDREWS, J. "Accord," says Sir William Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted is no bar; and tender of performance is insufficient. Bac. Abr. tit. Accord and Satisfaction, C. also accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed, to sustain a plea of accord and satisfaction. Bac. Abr. Accord Satisfaction, A; Cock *v.* Honeychurch, T. Ray. 203; Allen *v.* Harris, 1 Ld. Ray. 122; Lynn *v.* Bruce, 2 H. Bl. 317. In Peytoe's case, 9 Co. 79, it is said, "and every accord ought to be full, perfect and complete; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action. Evans *v.* Powis, 1 Ex. 601; Kinsler *v.* Pope, 5 Strob. 126; Pars. on Cont. 683, note.

An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between a debtor and his creditors; and they have been held, upon grouds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover the debt, although the composition agreement was still executory. Good *v.* Cheesman, 2 B. & Ad. 328; Bayley v. Homan, 3 Bing. N. C. 915. The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord; and the original obligation remains in force. Russell *v.* Lytle, 6 Wend. 390; Daniels *v.* Halenbeck, 19 id. 408; Hawley *v.* Foote, id. 516; The Brooklyn Bank *v.* DeGrauw, 23 id. 342; Tilton *v.* Alcott, 16 Barb. 598.

Applying the well settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26, 1876, was intended by the parties to be or was accepted as a substitute for or satisfaction of the plaintiff's judgment. It was, in effect, a proposition on the part of the plaintiff, in the alternative, to accept $3,000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of

$4,334.08, or to accept $1,000 in cash, in instalments, and the balance in merchandise, until the judgment should be reduced to $1,000; and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the $1,000, and supplied the merchandise, until the debt was reduced to $1,000, and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction under the new agreement was complete. It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force; and however indefensible in morals it may be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered; and he had the legal right to enforce the judgment for the balance remaining unpaid.[1]

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay $3,000 in cash, and assign the patent interests, or to pay $3,334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff no benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay $3,334.08 in merchandise to paying $3,000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

The order should be affirmed.

All concur. *Order affirmed.*

[1] Shepherd *v.* Lewis, T. Jones, 6; Lynn *v.* Bruce, 2 H. Bl. 317; Carter *v.* Wormald, 1 Ex. 81; Gabriel *v.* Dresser, 15 C. B. 622; Humphreys *v.* Third Nat. Bank, 75 Fed. Rep. 852, 859; Long *v.* Scanlan, 105 Ga. 424; Woodruff *v.* Dobbins, 7 Blackf. 582; Deweese *v.* Cheek, 35 Ind. 514; Young *v.* Jones, 64 Me. 563; White *v.* Gray, 68 Me. 579; Clifton *v.* Litchfield, 106 Mass. 34; Hayes *v.* Allen, 160 Mass. 34; Prest *v.* Cole, 183 Mass. 283; Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 549; Clarke *v.* Dinsmore, 5 N. H. 136; Rochester *v.* Whitehouse, 15 N. H. 468; Kidder *v.* Kidder, 53 N. H. 561; Gowing *v.* Thomas, 67 N. H. 399; Russell *v.* Lytle, 6 Wend. 390; Brooklyn Bank *v.* De Grauw, 23 Wend. 342; Tilton *v.* Alcott, 16 Barb. 598; Hearn *v.* Keihl, 38 Pa. 147; Blackburn *v.* Ormsby, 41 Pa. 97; Hosler *v.* Hursh, 151 Pa. 415; Clarke *v.* Hawkins, 5 R. I. 219; Carpenter *v.* Chicago, &c. Ry. Co., 7 S. Dak. 594; Gleason *v.* Allen, 27 Vt. 364, *acc.*

Bradley *v.* Gregory, 2 Camp. 383; Very *v.* Levy, 13 How. 345; Latapee *v.* Pecholier, 2 Wash. C. C. 180; Whitsett *v.* Clayton, 5 Col. 476; Jenness *v.* Lane, 26 Me. 475 (overruled); Heirn *v.* Carron, 19 Miss. 361; Coit *v.* Houston, 3 Johns. Cas. 243 (overruled); Bradshaw *v.* Davis, 12 Tex. 336; Johnson *v.* Portwood, 89 Tex. 235, 239, *contra.*

HENRY HUNT *v.* WILLIAM BROWN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 13–March 2, 1888

[*Reported in* 146 *Massachusetts,* 253]

HOLMES, J. The plaintiff made three notes to Russell, the defendant's intestate. Afterwards, according to the plaintiff's evidence in the present case, Russell promised that, if the plaintiff would assent to a compromise, by the executors of the plaintiff's father's will, of a claim in their hands against third persons, by which compromise the plaintiff's share of his father's estate would be diminished, Russell would accept in full settlement of the balance due upon the notes whatever percentage the executors should take in settlement of their claim. The executors then settled the claim for sixty-two per cent of the amount, with the plaintiff's assent. Then Russell died, and suit was brought by his administrator, the present defendant, upon the notes, against the present plaintiff. The latter pleaded a general denial and payment, and afterwards made an offer of judgment for the full amount of the notes, interest, and costs, which was accepted, and the sum was paid. The present suit is upon Russell's alleged agreement. The defendant asked a ruling that the agreement was without consideration, and also that the judgment in the former case was a bar. Both rulings were refused, and he excepts.

1. It is very plain that the jury were warranted in finding that the plaintiff's assent to the compromise was dealt with by the parties as a consideration, that is, as the conventional inducement of Russell's promise, and not merely as a condition precedent, and that if it was so dealt with it was sufficient. Evidence or even an admission that the compromise was for the plaintiff's advantage would not alter the case. In determining whether or not an act was dealt with by the parties to an oral agreement as a consideration, the fact that its consequences were seen to be advantageous to the actor may be important; but on the question of sufficiency alone, it is not enough that the immediate effect of the act is an abandonment of an actual or supposed right, whatever the balance of advantages may be in the long run. It is hard to imagine any change of position, not made in pursuance of a previous duty, which may not be sufficient as a consideration, or which is not a detriment in a legal sense.

2. If Russell had received the sixty-two per cent as agreed, and the suit had been brought for the residue, the question would arise whether the acceptance of less than the sum due, upon a collateral consideration, could be distinguished from an acceptance of less, before the notes fell due, or, like that, constituted an accord and satisfaction; Bowker *v.* Childs, 3 Allen, 434, 436; and if it was technically a satisfaction, whether, like a payment (Fuller *v.* Shattuck, 13 Grey,

70), it must not have been pleaded in the suit upon the notes if it was to be relied on at all, or whether there remained any contract unexecuted by the party satisfied which he would break if he afterwards brought suit. But Russell did not accept the sixty-two per cent; so that the only question is whether his agreement in any other way extinguished the notes in whole or in part, since in that case the judgment might be a bar.

The agreement was not itself a satisfaction. It was not a new contract substituted for the notes, and entitling the plaintiff to demand their surrender. Neither could it operate as a release of thirty-eight per cent of the notes, when the percentage was fixed by the compromise referred to. Language sometimes has been used which suggests that an agreement for a sufficient consideration might take effect by way of release, although not under seal. Goodnow *v.* Smith, 18 Pick. 414, 416; Petty *v.* Allen, 134 Mass. 265, 267; Taylor *v.* Manners, L. R. 1 Ch. 48. But the common law knows no such release. Shaw *v.* Pratt, 22 Pick. 305, 308. The consideration of the notes being executed, the agreement could operate only by way of accord and satisfaction. See Cumber *v.* Wane, 1 Smith's Lead. Cas. (8th Am. ed.) 633 and notes; Bragg *v.* Danielson, 141 Mass. 195, 196; May *v.* King, 12 Mod. 537, 538. The suggestion which we are considering, if stated in technical form, would have to be that Russell accepted the plaintiff's assent to the compromise which he desired, in satisfaction of thirty-eight per cent of the notes. But this is plainly a distortion of the evidence, according to which the assent was accepted, not as partial satisfaction of a debt, but as the consideration for a promise.

If, however, the jury might have been warranted in finding that the agreement, and what was done under it, had released or satisfied thirty-eight per cent, they were warranted at least equally in finding that it was purely executory in purport as well as in form, viz. to accept a percentage in satisfaction when it was paid. The court could not rule, as a matter of law, that the opposite construction was the true one, or assume the opposite construction as a foundation for its rulings.

But it may be said, that the contract must have been found to embrace the element that Russell would not sue for more than sixty-two per cent. And it may be argued that, if not technically a release it ought to have been available in defence *pro tanto*, by way of estoppel or otherwise, in order to avoid circuity of action, upon the same principle that a covenant not to sue is allowed to enure as a release. The answer is, that whether available in this way or not, whether or not such a defence would escape the objection that in substance it was accord without satisfaction, the plaintiff was not bound to use the agreement in defence. For if, as we have tried to show, and as the suggestion under consideration assumes, Russell's agreement did not extinguish the whole or any part of the notes,

but left them in full force, it also necessarily retained its independent character as a collateral contract. See further Costello *v.* Cady, 102 Mass. 140; Blake *v.* Blake, 110 Mass. 202. A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty. Smith *v.* Palmer, 6 Cush. 513, 521; Cobb *v.* Curtiss, 8 Johns. 470. See Burnett *v.* Smith, 4 Gray, 50, 52; Davis *v.* Hedges, L. R. 6 Q. B. 687.

When a defendant has the choice of setting up a matter in defence, or of suing upon it in another action, if he chooses not to set it up in defence, of course the judgment in the action against him is no bar to a subsequent suit by him. Smith *v.* Palmer, *ubi supra;* Star Glass Co. *v.* Morey, 108 Mass. 570, 573; Davis *v.* Hedges, *ubi supra.* Russell's agreement was not pleaded in the former action. Even if it had been executed, it would not have been admissible under a plea of payment. Ulsch *v.* Muller, 143 Mass. 379; Grinnell *v.* Spink, 128 Mass. 25. The present plaintiff, not having set up the agreement, and having no other defence, very properly saved himself costs and his antagonist delay by submitting at once to the inevitable and offering judgment. See Rigge *v.* Burbidge, 15 M. & W. 598. *Exceptions overruled.*

In Re HATTON

In Chancery, July 25, 1872

[*Reported in 7 Chancery Appeals,* 723]

George Hatton, on the 24th of March, 1871, filed his petition for liquidation or composition with his creditors, and at the first meeting of creditors the following resolutions were passed: "1. That a composition of 5*s.* in the pound shall be accepted in satisfaction of the debts due to the creditors from the said George Hatton; 2. that such composition be payable as follows: 2*s.* 6*d.* in the pound three months after registration of this resolution, and 2*s.* 6*d.* in the pound six months after registration"; which resolutions were duly confirmed and registered.

Messrs. Hodge & Co., as creditors of Hatton, assented to the resolutions, and received the first instalment of £5 18*s.* 9*d.* on their debt of £47 10*s.*

The second instalment became due on the 26th of October, 1871, but was not paid; and Hatton now alleged that he was unable to pay it. Hodge & Co. applied for payment, and on the 30th of April, 1872, commenced an action in the Court of Common Pleas to recover a balance of £45 8*s.*

Hatton then sent them an order for £5 18*s.* 9*d.* as the second instalment, which they refused to receive.

Hatton then obtained from the Registrar, acting as Chief Judge in Bankruptcy, an injunction restraining Hodge & Co. from proceeding with their action until further order of the court.

Hodge & Co. now moved, by way of appeal, to discharge the order granting the injunction.

Mr. *De Gex, Q. C.*, and Mr. *Bagley*, for the Appellants.

Mr. *Robertson Griffiths*, for Hatton.

Sir W. M. James, L. J. I think that we are bound by the decision of the Court of Common Pleas in Edwards *v.* Coombe, Law Rep. 7 C. P. 519.

We find, indeed, a decision in *In re* Hemingway[1] which appears to be conflicting with that decision, but there were peculiar circumstances in that case which may have had some influence upon the mind of the Chief Judge. Here, however, the question has resolved itself into the simplest form possible. If the debt continues to exist at common law, and it has been decided that the debt does continue so to exist, there is nothing in this case to induce us, as a Court of Equity, or a Court of Bankruptcy, to say that the debt does not exist in this court.

The act has provided that a certain majority of the creditors shall have power to bind every creditor to accept a composition, or something less than he is entitled to. In this case the creditor is to accept 5*s.* in the pound, payable by instalments, at three months and six months. It must be conceded that if this had been an agreement with any individual creditor, that agreement could not be pleaded as accord and satisfaction of the debt unless actual payment of the 5*s. modo et formâ* could also be pleaded; and I do not see why we are to suppose any difference between the two cases. It is true that the act has given not only power to make binding resolutions as to the composition, but power to the creditors to enforce in bankruptcy payment of the composition. That, however, amounts only to a further security, and does not alter the nature of the agreement. If the creditors had intended to make such an alteration, they might have said so. The resolution of the creditors might have provided that giving promissory notes, with or without sureties, should be accepted in discharge of the existing debts, and then the execution of the promissory notes by the debtor and the sureties might be pleaded as accord and satisfaction.

To give any other interpretation to the act would be to interfere with the general provisions of the act, and would in fact interfere with the ratable distribution of the assets, instead of having the contrary effect, as had been argued. It was said that the debtor might then be able to pay half his creditors, and leave the others unpaid, but that is entirely met by the provision at the end of the 126th section, enabling the court under such circumstances to adjudge the debtor a bankrupt. If the debtor applies great part

[1] Reported in 7 Ch. App. 724, *n.*

of his assets in payment of some of his debts, any other creditor, seeing that the debtor would then not be able to pay him, can go to the Court of Bankruptcy and have the debtor adjudged bankrupt, so as to prevent that state of things.

It appears to me that the Court of Common Pleas has decided in accordance with my own view, that the composition must be paid pursuant to the agreement, as well as agreed to be paid, to give the debtor a valid defence to an action at law; nor is there any defence or any equity in this court. There may be cases in which by accident, and not by default of the debtor, the composition is not duly paid, and then no doubt this court would relieve the debtor from the effect of such an accident, and remove any injustice.

Sir G. Mellish, L. J. I am of the same opinion. At common law, where a body of creditors accept a composition, they may either agree to take the promises of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place, the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him. There may be, as in this case, a simple composition which the creditors agree to accept if paid to the day, and there is in my opinion no reason why we should construe these resolutions otherwise.

In a similar case, as I understand it, the Court of Common Pleas has held that the creditor could maintain his action for the full amount, and there is nothing to induce us in this case to restrain him. The only excuse given by the debtor is that he had not money with which to pay this instalment; but that, under the circumstances, is not a sufficient excuse; and it was not until the action was brought that the composition was tendered.

The order of the Registrar must be discharged. The creditors will have their costs below, but not of the appeal.[1]

[1] See also Simmons *v.* Oullahan, 75 Cal. 508; Francis *v.* Deming, 59 Conn. 108; Prest *v.* Cole, 183 Mass. 283.

MITCHELL AND ANOTHER v. HAWLEY, IMPLEADED WITH FOOTE AND TAYLOR

NEW YORK SUPREME COURT, May, 1847

[*Reported in* 4 *Denio,* 414]

DEBT on a justice's judgment on a note signed by Foote as principal and Hawley and Taylor as sureties. The defendant Hawley was not served with process in the justice's court, and he alone was served with process in the present action. He proved as a defence an agreement by the plaintiff with Taylor, made after the judgment in the justice's court was rendered, but before the time for appeal had expired, by which the defendant agreed not to issue execution against Taylor, or endeavor to collect the judgment from him, but to look solely to the other defendants, in consideration of Taylor's agreement not to appeal.

The circuit judge held that this agreement constituted no defence, and directed a verdict for the plaintiff, to which the defendant's counsel excepted.[1]

N. Hill, Jun., for the defendant Hawley, moved for a new trial on a case.

D. Wright, for the plaintiffs.

By the Court, BEARDSLEY, J. It was said in James *v.* Henry, 16 Johns. 233, "That a justice's judgment was equivalent, at least, to a specialty; and that assumpsit will not, therefore, lie on such a judgment." But, strictly speaking, the judgment of a justice, in a case of which he has jurisdiction, is much more than equivalent to a specialty, for that may be impeached on various grounds, as fraud or illegality. Such a judgment, however, while unreserved, is, for every purpose, as conclusive between the parties as that of the highest court of record in the State. Pease *v.* Howard, 14 Johns. 479; Andrews *v.* Montgomery, 19 id. 162.

The judgment declared on in this case, was in the nature of a debt of record; and although as to the defendant Hawley, who had not been served with process and who did not appear in the cause before the justice, the judgment was only evidence of the extent of the demand after establishing his liability by other evidence, it was as to the other defendants, who had been duly served with process, absolutely conclusive. 2 R. S. 247, § § 122, 3; p. 251, § § 141, 2; p. 377, § 1 to 5. So far, therefore, as respects the defendants Taylor and Foote, this judgment was equivalent to a debt of record; and if, as to the defendant Hawley, it should be regarded as a security of an inferior grade, that would not affect the decision to be made upon the questions now before the court.

A judgment may certainly be released. Co. Lit. 291, *a;* 2 Shep.

[1] The statement of facts has been abbreviated.

Touch. by Preston, 322, 3; Barber *v.* St. Quentin, 12 M. & W. 452, Parke, B. But a release is always under seal, and here was none. Rowley *v.* Stoddard, 7 Johns. 207; Co. Lit. 264. In the present case there was nothing more than a parol agreement by the plaintiffs, founded on a like engagement by the defendant Taylor, that they would not take any proceeding on the judgment to collect the same of him, but would look to the other defendants alone for satisfaction thereof. This was in no sense a release, nor was the arrangement made between these parties valid, by way of accord and satisfaction.

It was an accord only, for nothing was received in satisfaction of the judgment. Taylor agreed not to carry the case to the common pleas by appeal, and the plaintiffs agreed not to enforce the judgment against him. So far everything rested in promises, for nothing whatever was executed by either party. An accord executory is in no case a bar. Com. Dig. Accord, B. 1, B. 4; Vin. Ab. Accord, A; Davis *v.* Ockham, Sty. 245; James *v.* David, 5 D. & E. 141; Lynn *v.* Bruce, 2 H. Black. 317; Bayley *v.* Homan, 3 Bing. N. C. 915; Allies *v.* Probyn, 2 C. M. & R. 408; Daniels *v.* Hallenbeck, 19 Wend. 408; Brooklyn Bank *v.* De Grauw, 23 id. 342.

There is another insuperable difficulty in looking at this arrangement as an accord and satisfaction; for such a plea can, in no case, be interposed as a bar to an action of debt founded on a record, or on a judgment in the nature of a record. "An obligation is not made void but by a release; for *naturale est quidlibet dissolve eo modo quo ligatur* — a record by a record, a deed by a deed; and a parol promise or agreement is dissolved by parol, and an act of parliament by an act of parliament. This reason and this rule of law are always of force in the common law." Jenk. Cent. p. 70. And this is strictly true with a single qualification, that a record, as well as a specialty, may be cancelled by a release. Barber *v.* St. Quentin, Parke, B., *supra;* Broom's Legal Max. 407; Shep. Touch. *supra;* 1 Saund. Pl. & Ev. 23; West *v.* Blakeway, 2 Scott's N. R. 199; 9 Dow, 846, s. c.

The principle stated applies as well to debts by specialty as to debts of record. But here a distinction is to be noted, for "when a duty doth accrue by the deed in certainty, *tempore confectionis scripti,* as by covenant, bill or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high nature, although that the duty be merely in the personalty: but when no certain duty accrues by the deed but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea." Blake's Case, 6 Rep. 43. Accord and satisfaction cannot discharge a specialty, although they will damages arising from the breach of a specialty. 1 Leigh's N. P. 694; 1 Chit. Pl. ed. 1837, 521, *c;* Com. Dig. Accord,

A. 2, 4; Bac. Ab. Accord and Satisfaction, B.; Vin. Ab. Accord, B.; Alden *v.* Blague, Cro. Jac. 99; Neal *v.* Sheaffield, id. 254; Kaye *v.* Waghorne, 1 Taunt. 428; Strang *v.* Holmes, 7 Cowen, 224.

"Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Com. 15. The bar rests on the agreement and not on the mere reception of property, for whatever amount may have been received, the right of action will not be extinguished, unless it was agreed that the property should be received in satisfaction of the injury. 1 Saund. Pl. & Ev. 23 to 26; Bac. Abr. Accord and Satisfaction; 3 Steph. Com. 373; 1 Ch. Pl. 613; 2 id. 924, 1022, 1031, 1156; Webb *v.* Weatherby, 1 Bing. N. C. 502; Ridley *v.* Tindall, 7 Adol. & El. 134. But the agreement thus to accept satisfaction is by parol, which, in its nature, is capable of discharging an obligation by record or specialty — *quodque dissolvitur eodem ligamine quo ligatur.*

On the same principle, payment of a debt of record could not, at common law, be pleaded to an action brought for the recovery of such debt; 1 Ch. Pl. 521; 2 id. 996, *a*, note h; 2 Saund. Pl. & Ev. 712, 713, 717; or of a debt by specialty. Dyer, 25, *b*. But it is otherwise by statute. 2 R. S. 353, § § 11, 12, 13; I R. L. of 1813, p. 517, § 5.

The judgment on which this action was brought, not having been cancelled or impaired as to either of the parties, by the arrangement between the plaintiffs and Taylor, no defence was shown on the trial, and the motion for a new trial must be denied.

New trial denied.[1]

STEEDS AND ANOTHER *v.* STEEDS AND ANOTHER

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, February 4, 6, 1889

[*Reported in* 22 *Queen's Bench Division*, 537]

THE judgment of the court (Huddleston, B., and Wills, J.) was read by —

WILLS, J. The plaintiffs in this case sue for a sum of money alleged to be due for principal and interest on a bond made in their favor by the two defendants.

[1] In Boffinger *v.* Tuyes, 120 U. S. 198, 205, Mr. JUSTICE MATTHEWS in delivering the opinion of the court, said: "The technical difficulty that there can be no satisfaction and discharge of a judgment or decree, except by matter of record, Mitchell *v.* Hawley, 4 Denio, 414; s. c. 47 Am. Dec. 260, cannot be interposed. At common law actual payment of a debt of record could not be pleaded in bar of an action for the recovery of the debt. This has been changed by statute both in England and in this country, and no reason can be assigned why an accord and satisfaction should not have the same effect." See also *Re* Freeman, 117 Fed. Rep. 680, 684; Savage *v.* Blanchard, 148 Mass. 348; Fowler *v.* Smith, 153 Pa. 639, Black on Judgments, § 976.

One of the defendants pleads that he delivered to one of the plaintiffs certain stock and goods which were given by him and accepted by the said plaintiff in satisfaction and discharge of the money due upon the bond. The other defendant pleads that he executed the bond as surety and was discharged by the transaction set up by the first defendant.

The plaintiffs apply to have this defence struck out, as being no answer to their claim. The same question arises as to both defendants, and is shortly whether in respect of a bond given by C. to A. and B., accord and satisfaction made by C. to A. after the cause of action had arisen, and accepted by A., is an answer to the claim of A. and B.

On behalf of the plaintiffs two objections are raised. 1. That in respect of a specialty debt, accord and satisfaction of the cause of action by the person or persons liable is no more an answer to the action in equity than it is at law. 2. That even if it would be so, were the bond made in favor of A. alone, accord and satisfaction with A. is no answer in equity to the action by A. and B.

It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for £1,000 the person liable had given property worth £2,000, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his £1,000 without returning the property.

One would have thought that if the Courts of Equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon a case of Webb *v.* Hewitt, 3 K. & J. 438, which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the *ratio decidendi* of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone, and there was an end of it.

Upon the first point, therefore, we are against Mr. Wood, and have

no doubt that if payment to one of the plaintiffs would have been an answer, the delivery to him and acceptance by him of goods in satisfaction of the debt would be equally an answer.

But Mr. Wood is, we think, right in saying that, as the defence is an equitable one, it is equally necessary to establish that payment by C., the obligor, to A., the latter being joint obligee with B., would in equity be an answer to the claim by A. and B. on the bond. We cannot follow Mr. Bullen's argument that as equity would treat the satisfaction as equivalent to payment, having got so far, he is at liberty to discard any further reference to equity, and say that as at common law payment to or release by A. would prevent A. and B. from suing, he is now in a position to treat A. as having been paid, and say that as this is a common law action there is the equivalent to a common law defence. If he is obliged to resort to equity for his defence, he must take the equitable principles applicable to the circumstances in their entirety; and we must therefore inquire what is the rule in equity with respect to payment to one of two co-obligees or co-creditors.

The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and he cannot afterwards, by joining the other parties with him as plaintiffs, recover the debt; nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value. Wallace *v.* Kelsall, 7 M. & W. 264.

In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will *primâ facie* be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it. Petty *v.* Styward, Eq. Ca. Abr. 290; Rigden *v.* Vallier, 2 Ves. Sen. 258, cited in the notes to Lake *v.* Craddock, 1 White & Tudor, 5th ed. 208. "Though they take a joint security," says Lord Alvanley, M. R., "each means to lend his own money and to take back his own." Morley *v.* Bird, 3 Ves. 631. Where a mortgage debt has been paid to one of the mortgagees, accordingly, it was held that the land was not discharged, and that the concurrence of the other mortgagees was necessary to make a good title. Matson *v.* Dennis, 10 Jur. (N. S.) 461, 12 W. R. 926. This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract. The principal right of a mortgagee is to the money, the estate in the land is only an accessory to that right.

It is obvious, however, that this proposition cannot be put higher than a presumption capable of being rebutted. If the money, sup-

posing it to have been lent, were trust money, the presumption of a tenancy in common on the part of the two trustees could not, as it seems to us, arise. Survivorship is essential for the purpose of trusts, and so there may be a variety of circumstances which may settle the question either one way or the other. In the present case we do not even know whether the bond was for money lent, or what was the groundwork of the obligation, and it is clear that if the presumption is that the interest in this obligation belonged in equal portions in severalty to the two plaintiffs, the plaintiff who was settled with by the accord and satisfaction has been paid his half, at all events, and it cannot be recovered again in this action.

We think, therefore, that we cannot strike out this defence as we are invited to do. It seems to us that it must be good for a part of the claim at all events. But we think the statement of defence defective, and that Mr. Bullen ought to amend by a further statement of the material facts, and our order is that the statement of defence be amended accordingly, and if that be not done within ten days, the plaintiff be at liberty to sign judgment for half the amount claimed. We trust that upon the amended pleading being delivered the plaintiffs will, if possible, meet it by any necessary addition to or correction of the facts alleged, and not repeat a motion of this kind, which asks the court to do what is to the last degree unsatisfactory, give judgment for a defect of pleading and in ignorance of all the facts which ought to be known before the rights of the parties are definitely adjudicated upon. Both parties are partly responsible for the present motion, and the costs of this appeal will be costs in the cause. *Order accordingly.*[1]

[1] In Savage *v.* Blanchard, 148 Mass. 348, Holmes, J., in delivering the opinion of the court, said: "In former days, possibly a technical difficulty might have been found in the rule, that, although accord and satisfaction is a defence to a liability for damages, even on a specialty, a discharge of an obligation under seal or of record to pay a definite sum of money must be of as high a nature as the obligation. Blake's case, 6 Rep. 43 b, 44 a; Peploe *v.* Galliers, 4 Moore, 163, 165; Spence *v.* Healey, 8 Exch. 668; Riley *v.* Riley, Spencer 114; Mitchell *v.* Hawley, 4 Denio, 414. But this rule has been much broken in upon by statute, and by decisions upon equitable grounds, in modern times. Bond *v.* Cutler, 10 Mass. 419, 421; Farley *v.* Thompson, 15 Mass. 18, 25; Sewall *v.* Sparrow, 16 Mass. 24, 27, and cases cited in Quincy *v.* Carpenter, 135 Mass. 102, 104; Ballou *v.* Billings, 136 Mass. 307, 309; Hastings *v.* Lovejoy, 140 Mass. 261, 265; Herzog *v.* Sawyer, 61 Md. 344; Weston *v.* Clark, 37 Mo. 368, 572; Hurlbut *v.* Phelps, 30 Conn. 42. We have no doubt that an indorser of a writ may prove payment, or accord and satisfaction, by parol evidence, and that satisfaction before judgment in the original suit is as good a bar as satisfaction afterwards."

See further 3 Williston Contracts, §§ 1849, 1850

WHITTAKER CHAIN TREAD COMPANY *v.* STANDARD AUTO SUPPLY CO

SUPREME JUDICIAL COURT OF MASSACHUSETTS, January 15–December 13, 1913

[*Reported in* 216 *Massachusetts,* 204]

LORING, J. The plaintiff sold and delivered to the defendant goods to amount of $80.03. The defendant undertook to return a part of the goods sold, of the value of $50.02. The plaintiff disputed its right to do so and refused to receive the goods from the teamster through whom the defendant undertook to make the return. While matters were in this condition the defendant sent the plaintiff a check for $30.01, which was admittedly due and which the defendant stated was in full settlement of the account. The plaintiff cashed the check and on the following day notified the defendant that it had done so, and demanded payment of $50.02, the balance claimed by it to be due after crediting the amount of the check as a payment on account. The judge found that the defendant had no right to return the goods which it attempted to return, and that the plaintiff was entitled to recover the $50.02 due from them unless it was barred by cashing the check.

Cases in which debtors have undertaken to force a settlement upon their creditors by sending a check in full discharge of a disputed account have given rise to more than one question upon which there is a conflict in the authorities.

In Day *v.* McLea, 22 Q. B. D. 610, it was decided by the Court of Appeal in England that a creditor who cashes a check sent in full settlement is not barred from contending that he did not agree to take it on the terms on which it was sent if at the time he accepts it he says that he takes it on account. The ground of that decision was that to make out the defense of accord and satisfaction the debtor must prove an agreement by the creditor to take the sum paid in settlement of the account, and that if the creditor in taking the check notifies the debtor that he accepts it on account and that he refuses to accept it in full settlement, the debtor as a matter of law has not proved an agreement on the part of the creditor to accept the check in satisfaction of the claim, but that that question must be decided by the jury. This doctrine is upheld in 17 Harvard Law Review, at p. 469, and in the case of Goldsmith *v.* Lichtenberg, 139 Mich. 163. See also in this connection Krauser *v.* McCurdy, 174 Penn. St. 174; Kistler *v.* Indianapolis & St. Louis Railroad, 88 Ind. 460.

But the true rule is to the contrary. The true rule is put with accuracy in Nassoiy *v.* Tomlinson, 148 N. Y. 326, 331, in these words: "The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the

benefit and reject the condition, for if he accepted at all, it was *cum onere*. When he indorsed and collected the check, referred to in the letter asking him to sign the enclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered." And to that effect is the weight of authority. Nassoiy *v.* Tomlinson, 148 N. Y. 326. Washington N. Gas Co. *v.* Johnson, 123 Penn. St. 576. Partridge Lumber Co. *v.* Phelps-Burruss Lumber & Coal Co. 91 Neb. 396. Neely *v.* Thompson, 68 Kans. 193. Hull *v.* Johnson, 22 R. I. 66. Cunningham *v.* Standard Construction Co. 134 Ky. 198. Canton Union Coal Co. *v.* Parlin, 215 Ill. 244. Petit v. Woodlief, 115 N. C. 120. Pollman & Brothers Coal & Sprinkling Co. *v.* St. Louis, 145 Mo. 51. Potter *v.* Douglass, 44 Conn. 541. Cooper *v.* Yazoo & Mississippi Valley Railroad, 82 Miss. 634. Barham *v.* Kizzia, 100 Ark. 251. Thomas *v.* Columbia Phonograph Co., 144 Wis. 470. Sparks *v.* Spaulding Manuf. Co., 159 Iowa, 491. See also in this connection McDaniels *v.* Bank of Rutland, 29 Vt. 230; Hutton *v.* Stoddart, 83 Ind. 539; Creighton *v.* Gregory, 142 Cal. 34.

Indeed the decision in Day *v.* McLea, *ubi supra,* was explained by the Court of Appeal in the recent case of Hirachand Punamchand *v.* Temple, [1911] 2 K. B. 330, and made to rest not on the lack of agreement, but on the lack of consideration.

But in cases (like the case at bar) where there is a dispute as to the amount due under a contract, and payment of an amount which he (the debtor) admits to be due (that is to say, as to which there is no dispute) is made by the debtor in discharge of the whole contract, further and other questions arise.

The question whether the creditor who under these circumstances accepts such a payment, protesting that he takes it on account, is or is not barred, is a question upon which again the authorities are in conflict. It was held in the following cases that creditor in such a case is barred: Nassoiy *v.* Tomlinson, 148 N. Y. 326; Ostrander *v.* Scott, 161 Ill. 339; Tanner *v.* Merrill, 108 Mich. 58; Neely *v.* Thompson, 68 Kans. 193; Treat *v.* Price, 47 Neb. 875; Hull *v.* Johnson, 22 R. I. 6; Cunningham *v.* Standard Construction Co. 134 Ky. 198; Pollman & Brothers Coal & Sprinkling Co. *v.* St. Louis, 145 Mo. 651. See also in this connection Chicago, Milwaukee & St. Paul Railway *v.* Clark, 178 U. S. 353. But in the following cases it was held that he was not barred: Demeules *v.* Jewel Tea Co., 103 Minn. 150; Seattle, Renton & Southern Railway *v.* Seattle-Tacoma Power Co., 3 Wash. 639; Prudential Ins. Co. *v.* Cottingham, 103 Md. 319. See also in this connection Chrystal *v.* Gerlach, 25 So. Dak. 128; Robinson *v.* Leatherbee Tie & Lumber Co. 120 Ga. 901; Walston *v.* F. D. Calkins Co. 119 Iowa, 150; Weidner *v.* Standard Life & Accident Ins. Co. 130 Wis. 10; Louisville, N. A. & C. Railway *v.* Helm & Bruce, 109 Ky. 388.

The decision in most of these cases was made to turn upon the question whether the payment of the amount admitted to be due without dispute did or did not constitute a valid consideration for the discharge of the balance of the debt about which there was a dispute. If that were the only question involved in the case at bar it would be necessary to consider whether Tuttle *v.* Tuttle, 12 Met. 551, is in conflict with the well settled law of the Commonwealth that a promise to pay one for doing that which he was under a prior legal duty to the promisee to do is not binding for want of a valid consideration. The cases are collected in Parrot *v.* Mexican Central Railway, 207 Mass. 184, 194.

Tuttle *v.* Tuttle, *ubi supra,* was a case in which the holder of a note made an express agreement to forego a claim which he had made to interest on the note in consideration of payment of the balance of the principal then unpaid. It was a question whether he was entitled to interest, but there was no question of his right to the principal. It was held that this agreement was a bar to any claim for interest on the note. There was no discussion in the opinion as to the lack or validity of a consideration. But the point was involved in the decision.

In the case at bar there was no express agreement by the creditor to forego the balance of his claim on receiving payment of the amount admitted without dispute to be due. The only way in which such an agreement can be made out in the case at bar is on the ground that the plaintiff had to take the check sent him on the condition on which it was sent, and that by cashing the check he elected to accept the condition and so took the part admittedly due in full discharge of the whole debt. But while the doctrine of election is sound where a check is sent in full discharge of a claim no part of which is admitted to be due, it does not obtain where a debtor undertakes to make payment of what he admits to be due conditioned on its being accepted in discharge of what is in dispute. Such a condition, under those circumstances, is one which the debtor has no right to impose, and for that reason is void. In such a case the creditor is not put to an election to refuse the payment or to take it on condition on which it is offered. He can take the payment admittedly due free of the void condition which the debtor has sought to impose. Take an example: Suppose the defendant had agreed to deliver to the plaintiff a stipulated quantity of iron for a stipulated price during each month of the year, and after six months the market price of iron was double that stipulated for in the contract. Suppose further that the defendant on the seventh month sent the stipulated amount of iron but on condition that the plaintiff should pay double the stipulated price, can there be any doubt of the plaintiff's right to retain the iron without paying the double price? That is to say, can there be any doubt that the condition which required the plaintiff to pay double the contract price for the installment sent was void and that the plaintiff under those circumstances is not put to an election but can keep the iron under the contract?

There can be no doubt on that question in our opinion; and in our opinion the principle of law governing that case governs the case at bar, where the debtor undertook without right to impose upon a payment of what admittedly was due a void condition that it be received in full discharge of what was in dispute.

It follows that in accepting the check in the case at bar as a payment on account, the plaintiff was within its rights and that it has not agreed to accept it in full settlement of the balance of the account. By the terms of the report judgment is to be entered for the plaintiff in the sum of $50.02, with interest from the twentieth day of October, 1911; and it is *So ordered.*[1]

FRANK L. JACKSON, Plaintiff in error, *v.* THE PENNSYLVANIA RAILROAD COMPANY, Defendant in Error

New Jersey Court of Errors and Appeals, November 23, 1900–April 29, 1901

[*Reported in* 66 *New Jersey Law,* 319]

Adams, J. The plaintiff, a driver employed by the Adams Express Company, was injured on October 18, 1899, at the Pennsylvania railroad depot, in Jersey City, while transferring goods from his wagon to a freight car. He brought suit against the railroad company, and recovered a verdict. Exceptions were taken to the refusal of the trial judge to nonsuit the plaintiff, and to direct a verdict for the defendant, and on these exceptions error has been assigned. The question of negligence is in the case, but need not be considered, as the defence of accord and satisfaction is decisive.

[The defendant proved in support of its defence of accord and satisfaction that the Adams Express Company was bound by a contract with the defendant to save it harmless from certain liabilities, including such actions as that of the plaintiff, and that in consideration of the payment to him by the Express Company of wages during a period of incapacity, the plaintiff had agreed to accept such payment in full satisfaction of all claims for his injuries. The case is free from any charge of fraud and from any suggestion that the plaintiff did not comprehend the document that he signed.[2]]

It remains to consider the real question in controversy, which is as to the effect of an accord and satisfaction entered into, not with the person against whom a claim is asserted, but with a third person. In this case the third person is a corporation, which, between itself and the person against whom the claim is asserted, has made

[1] The numerous authorities on the questions discussed in this case are collected in 3 Williston, Contracts, 1854, *et seq.*

[2] This statement has been substituted for the fuller statement in the opinion.

itself primarily liable by an agreement undisclosed to the claimant.

An early authority as to accord and satisfaction with a third person is Grymes *v.* Blofield, Cro. Eliz. 541, which reads as follows:

"Debt Upon an Obligation of 20 pounds. The Defendant pleads, That J. S. Surrendered a Copy-hold Tenement to the use of the Plaintiff in satisfaction of that 20 pounds, which the Plaintiff accepted, &c. And it was thereupon demurred. Popham, and Gawdy held it to be no plea: for J. S. is a mere stranger, and in sort privy to the Condition of the Obligation: and therefore satisfaction given by him is not good. *Vide* 36 H. 6; Barr, 166; 7 H. 4, pl. 31. Afterwards, Pasch. 31, Eliz, by Popham; and Clench, *cæteris justiciariis absentibus,* it was adjudged for the Plaintiff."

In Edgcombe *v.* Rodd, 1 Smith, 515, reported also in 5 East, 294, the case of Grymes *v.* Blofield was discussed, Mr. Justice Lawrence remarking that it was quite unreasonable to doubt the authority of that case. In Jones *v.* Broadhurst, 9 C. B. 193, Mr. Justice Cresswell commented upon Grymes *v.* Blomfield, and pointed out its inconsistency with an earlier case, which is thus stated in Fitz. Abr. tit. "Barre," pl. 166 (Hilary, 36 H. of L. 6): "If a stranger doth trespass to me, and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" A course of decision ensued, which Baron Parke summed up in Simpson *v.* Eggington, 10 Exch. 844, in the following words:

"The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of Jones *v.* Broadhurst, 9 C. B. 193; Belshaw *v.* Bush, 11 C. B. 191, and James *v.* Isaacs, 22 L. J. C. P. 73; and the result appears to be that it is not sufficient to discharge a debtor unless it is made by the third person, as agent for and on account of the debtor, and with his prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Cresswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In Belshaw *v.* Bush, it was decided that a payment by a stranger considered to be for the defendant and on his account, and subsequently ratified by him, is a good payment; and in the last case of James *v.* Isaacs, a satisfaction from a stranger, without the authority, prior or subsequent, of the defendant, was held to be bad. We consider therefore the law as fully settled by these cases."

The English cases justify the observation of Mr. Justice Wales, in Snyder *v.* Pharo, 25 Fed. Rep. 398 (at p. 401), that none of the later decisions adhere with any strictness to the rule laid down in Grymes *v.* Blofield, and that it is evident, from an examination of

them, that a plea of satisfaction by a stranger, when properly averred, would be held good.

In the United States the case of Grymes *v.* Blofield has been, to some extent, followed, notably in the State of New York. The earliest case is Clow *v.* Borst, 6 Johns, 37, which, like Grymes *v.* Blofield, arose upon a point of pleading. It was there held, on demurrer, in an action of covenant, that a plea of the acceptance of a satisfaction by the plaintiff from a third person or stranger is not good. The case was followed in Daniels *v.* Hallenbeck, 19 Wend. 408; Bleakley *v.* White, 4 Paige, 654; Atlantic Dock Co., &c. *v.* New York, 53 N. Y. 64, and Muller *v.* Eno, 14 id. 597, 605. To the same effect is Armstrong *v.* School District No. 3, 28 Mo. App. 169. These cases are not, on the whole, inconsistent with the idea that this defence may be made if it be properly pleaded.

The tendency of the American decisions is strongly in favor of supporting a satisfaction moving from a third person, when such person either had authority to make it or the act was followed by ratification and the article received in satisfaction was retained. In Leavitt *v.* Morrow, 6 Ohio 71; s. c. 67 Am. Dec. 334, the Supreme Court of Ohio (Chief Justice Bartley reading the opinion) held, after a vigorous discussion of the doctrine, that an accord with and satisfaction coming from a stranger having no pecuniary interest in the subject-matter are, if accepted in discharge of the debt, a perfect defence to a subsequent action against the debtor. Another valuable case is Snyder *v.* Pharo, 25 Fed. Rep. 398, 401, where, in an opinion written by Mr. Justice Wales, all the leading cases are cited. The head-note reads as follows: "Satisfaction of a debt by the hands of a stranger is good when made by the authority of or subsequently ratified by the defendant. The fact of pleading it will be sufficient evidence of ratification." In Beach Mod. L. Cont. 542, it is said that an accord with and satisfaction moving from a stranger or person having no pecuniary interest in the subject-matter, if accepted in discharge of the debt, constitute a good defence to an action to enforce the liability against the debtor. In the note to Cumber v. Wane, 1 Sm. Lead. Cas. (9th ed.) 625, the same conclusion is reached. The reason of the rule is simple. On the one hand, no party can be deprived of a right by mere payment by a volunteer. On the other hand, since a party is entitled to only one satisfaction, his acknowledgment that he has received it, and his retention of it, operate to extinguish his right. As was said in Hanshaw *v.* Rawlings, 1 Str. 23: "Although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is." In 2 Pars. Cont. (8th ed.) 688, the same rule is stated, with the remark that the defence is clearly available when the debtor and the stranger are principal and agent. In 2 Chit. Cont. (11th ed.) 1133, this is said to be the correct doctrine. This is true, because the nature of the relation of principal and agent is such that proof of its existence necessarily shows that

the person against whom the claim is asserted has made the accord and the satisfaction his own.

In the case in hand the express company was not an agent of the railroad company. It was its indemnitor. This does not weaken the defence. The express company is bound by contract to answer for just such damages as these. As the plaintiff is no party to this contract, and so is not bound by it, the performance by the express company of its obligation goes in exoneration of the express company. To use the language of Baron Parke, its payment is "for the defendant and on its account," since the plaintiff's right of action against the railroad company is one of which nothing but his own consent can deprive him. Moreover, the plea recognizes and adopts the settlement. There are present here original authority; action beneficial to the defendant, founded on a new consideration; ratification and retention by the plaintiff of the payment received in satisfaction. These are the elements that bring a case within the rule. It follows that the defence of accord and satisfaction was sustained by the proof, and that it was error to refuse to direct a verdict for the defendant. *The judgment is reversed.*[1]

IN RE LAYCOCK *v.* PICKLES AND ANOTHER

IN THE QUEEN'S BENCH, November 13, 1863

[*Reported in* 4 *Best & Smith,* 497]

THE plaintiff, having a claim for work and labour and materials against the defendants to the amount of 67*l.*, was indebted to them in 111*l.* The defendants, as security for 100*l.* held an equitable mortgage upon land of the plaintiff. The parties, having met together, ascertained the value of the plaintiff's interest in the land to be 70*l.*; and it was verbally agreed that the defendants should have the plaintiff's equity of redemption, and that the plaintiff should be credited with 70*l.* which being added to the 67*l.* the debt of 111*l.* was to be wiped out, and a balance of 26*l.* left in his favour; but it was finally agreed that it should be taken at 22*l.* The plaintiff, before action brought, sold the land to the defendants.

BLACKBURN, J. After stating the facts, proceeded: It may have been a great advantage to the defendants that there should be a settlement of the accounts, including many items, in the manner stated; and I think that the stating of the accounts itself was a sufficient consideration to support this action.

The question is, whether the balance can be recovered on a count upon an account stated. An account stated is commonly called an admission of a debt; but it is merely evidence of it. There is a

[1] See 3 Williston, Contracts, § 1857, *et seq.*

real account stated, called in old law an *insimul computassent,* that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts *in praesenti,* or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side; and the balance is recoverable as if money had been really taken in satisfaction; subject to this, that where some of the items are such that, if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated. That is borne out by Com. Dig. tit. *Pleader* (2 G. 11): "So to an *assumpsit,* the defendant may plead that, since the promise made, he and the plaintiff *insimul computaverunt, et super compot' ill' ipse inventus fuit* in arrear, so much, which he has paid." And further on it is said, "But an account without payment or release is no plea to an *indebitatus assumpsit";* referring to a case in 3 Lev. 238, "for a chose in action cannot discharge a matter executed." I think that is true of an account stated where there is only one item; but when there are several cross-items, it is really an account stated and there is a discharge of the items on either side: as was ruled in Milward *v.* Ingram, 2 Mod. 43, where, in indebitatus assumpsit for 50*l.*, the Court held a plea good, which stated that after the promise made, and before the action brought, the parties came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30*s.*; whereupon, in consideration that the defendant promised to pay him the said 30*s.*, the plaintiff likewise promised to release and acquit the defendant of all demands. The same principle is to be found in Dawson *v.* Remnant, 6 Esp. 24. The report of that case, though not in a book of high authority is clear and intelligible, and therefore may be taken to be correct, except that, in p. 25, where Mansfield, C. J., is reported to have said, "A set-off is in the nature of payment," "set-off" seems a mistake for "settlement in account." Here the arrangement between the parties was, that the 70*l.* at which the plaintiff's interest in the land was valued should be taken as if it had been paid by the defendants to the plaintiff, and paid back to the defendants in part payment of the 111*l.* due from the plaintiff to the defendants. The defendants object that, inasmuch as this transaction was by word of mouth, they could not enforce the agreement for the transfer of the equity of redemption, but, if the 70*l.* had been actually paid down, the defendants could not have recovered it back without

showing that the plaintiff had made default in transferring the equity of redemption, or had refused to transfer it; in which case they might have opened the account. But there is no attempt to show that the plaintiff ever refused to perform the agreement, or that he set up the Statute of Frauds in order to be off his bargain. I therefore think that here was sufficient evidence of an account stated, and that the plaintiff was entitled to succeed.[1]

HENRY B. SLAYBACK *v.* HOWARD T. ALEXANDER

NEW YORK SUPREME COURT, APPELLATE DIVISION,
November 9, 1917

[*Reported in* 179 *New York Appellate Division,* 696]

LAUGHLIN, J.: On the stipulated facts the plaintiff claims the right to recover the sum of $1,015.71, the amount of defendant's indebtedness to him as shown by an account rendered on the 1st day of March, 1913, together with interest thereon from that date. Defendant claims that the account so rendered did not constitute an account stated and that the cause of action which on the facts stipulated plaintiff once had, is barred by the Statute of Limitations. The point presented for decision is whether there was an account stated between the parties on the 1st day of March, 1913, as claimed by the plaintiff, for if there was concededly the Statute of Limitations has not run against it.

On the 2d day of May, 1907, defendant opened an account with the stock-brokerage firm of Slayback & Co. for the purpose of buying and selling securities upon margin pursuant to the rules and customs of the New York Stock Exchange. Numerous orders to buy and sell securities were executed by the firm for defendant's account, and the last transaction was the purchase of fifty shares of Union Pacific Railway Company stock on the 13th day of July, 1908, to cover a prior sale. After that purchase the customer was neither long nor short of securities, but there was a balance owing by him to the brokerage firm of $758.64. During the time the account was active the brokerage firm rendered monthly statements to the customer in accordance with the general custom and rendered such a statement on the 1st day of August, 1908, after the last transaction. Thereafter the brokerage firm continued to render monthly statements which showed no items of account between the parties but merely the balance as shown by the preceding monthly account upon which interest for the month had been computed and added, thus showing a new balance by the addition of one month's interest on the former balance. Such was the statement rendered by the

WIGHTMAN and MELLOR, JJ. delivered concurring opinions.

brokerage firm to the defendant on the 1st day of March, 1913, which the plaintiff claims constituted the account stated. On the 28th of March, 1914, the brokerage firm dissolved and the plaintiff, who was one of the members thereof, became the assignee of the account.

On the facts stipulated the account rendered on the 1st day of August, 1908, after the last transaction between the parties, which was received, examined and retained by defendant without exception, clearly constituted an account stated as to the entire balance and gave rise to a new cause of action quite independent of the original cause of action on the account, the Statute of Limitations not having then run against any of the items of the account constituting the original transactions. (Lockwood *v.* Thorne, 11 N. Y. 170; Spellman *v.* Muehlfeld, 166 id. 245; Eames Vacuum Brake Co. *v.* Prosser, 157 id. 289; Daintrey *v.* Evans, 148 App. Div. 275; Knickerbocker *v.* Gould, 115 N. Y. 533; Schutz *v.* Morette, 146 id. 137; Delabarre v. McAlpin, 101 App. Div. 468; 25 Cyc. 1138.) The subsequent monthly statements of the account were merely renditions of the account already rendered with the exception of the addition of the monthly interest. Manifestly the addition of the interest monthly did not constitute the statement then rendered a new account, for in so far as it involved compound interest, which was the only new item in it, it was unauthorized and, therefore, the monthly accounts rendered were quite analogous to the monthly rendition of an overdue account by a merchant to a customer, and only differed therefrom in the addition of the interest. No decision has been cited and we have found none in which the question arose as to whether a cause of action on an account stated may be continued indefinitely against the Statute of Limitations by merely rendering the same over and over again within each six-year period. We are of the opinion that where an account becomes an account stated by reason of its being forwarded and received and retained after examination as here the cause of action upon that account stated thereupon accrues and the Statute of Limitations commences to run and that it is not within the power of the creditor to extend the running of the Statute of Limitations merely by rendering the same account over again from time to time.

It follows that the defendant should have judgment for a dismissal of the complaint as claimed, but, in accordance with the stipulation, without costs.

Scott, Smith, Page and Davis, JJ., concurred.

SECTION V

ARBITRATION AND AWARD

FREEMAN *v.* BERNARD

IN THE KING'S BENCH, TRINITY TERM, 1702

[*Reported in* 1 *Lord Raymond,* 247]

ASSUMPSIT upon an agreement for the delivery of a certain quantity of hops, etc. The defendant pleads that the plaintiff and he had submitted this matter to the arbitration of J. S., *ita quod* the award should be made, and ready to be delivered, by such a day, &c., and the defendant shows that J. S. made an award before the day that the defendants or his executors or administrators should give a general release to the plaintiff, and that the plaintiff should give a general release to the defendant; and the defendant pleads that he was always ready, and yet is, to sign and seal a release. The plaintiff demurs. And divers exceptions were taken to this award: 1. That the submission is *ita quod* the award be ready to be delivered by such a day, and the defendant has not averred that it was ready to be delivered by the day. *Sed non allocatur.* For per HOLT, C. J., it has been often held in this court that if the award be made by the day, it is ready to be delivered, and so it appears, and therefore there is no need to aver that it was ready. 2. Exc.: That the award is void for the uncertainty, viz., that he or his executors or administrators, &c., so that time is left to him to perform it during his life, or he may leave it to his executors. And election given in an award is ill. 1 Roll. Rep. 271. But to this exception Mr. *How*, for the defendant, argued that the court will reject the words "or his executors or administrators," because as to them (he said) the award was void; for the executor or administrator is out of the submission, and the power of the arbitrator determines with the life of the person submitting and so cannot extend to the executor or administrator. Debt upon award does not lie against an executor or administrator. But HOLT, C. J., said that the executors are bound by the submission of their testator; but the addition of them in this award is but cautionary, and therefore will not vitiate. 3. The third exception was that the plea is ill because the defendant has not averred performance of this award, and the plaintiff has no remedy to compel him to perform it. *Sed non allocatur.* For per HOLT, C. J., heretofore if the award was that the party should do any collateral act, it was held that the party could not plead this before performance; *contra* if the award appointed the payment of money. And the reason was because the party had no remedy in the former case to compel performance;

but otherwise in the latter case. But that reason fails now; for now assumpsit lies upon the mutual promises, and no assumpsit was allowed formerly upon mutual promises; but heretofore, if the submission was by bond, the award might have been pleaded before performance, because the party might have had remedy to compel performance. And HOLT, C. J., said that he had known a rule of court to submit to an award to be given in evidence upon assumpsit. But judgment was given by the whole court for the plaintiff; for the arbitrator has awarded nothing in satisfaction, but only has ordered means to discharge the action. He has not awarded a horse or money in satisfaction, but only mutual releases. Where an award creates a new duty instead of that which was in controversy, the party has remedy for it upon the award; and therefore if the party resorts to demand that which was referred and submitted, the arbitrament is a good bar against such action. *Contra* where the award does not create a new duty, but only extinguishes the old duty by a release of the action.

ALLEN *v.* MILNER

IN THE EXCHEQUER, MICHAELMAS TERM, 1831

[*Reported in 2 Crompton & Jervis,* 47]

LORD LYNDHURST. This was an action of *indebitatus assumpsit,* for tolls, &c. The defendant pleaded, as to the count for tolls, that differences had arisen between him and the plaintiff, touching the said claim, and that they mutually submitted themselves to refer, and did refer, the said matter in difference to arbitration; that they mutually promised to abide by the award; and that the umpire made his award of and concerning the said premises, and did thereby award, that the defendant should pay to the plaintiff the sum of £13. To this plea, the plaintiff demurred specially, because the plaintiff did not aver payment of the £13, or any other satisfaction of the plaintiff's demand. The question, therefore, is, whether this award is, of itself, without payment or satisfaction, any bar; and considering the nature of the plaintiff's demand, and the nature of the award, we are of opinion that it is not. The plaintiff's demand is for a debt, and the award is not for the performance of any collateral act, but for the payment of money. The matter, therefore, for the consideration of the arbitrator was, whether there were any, and what debt; the award only ascertains that there is a debt, specifies the amount, and directs the payment; but the money, till paid, is due in respect of the original debt, *i. e.* for tolls; its character remains the same, nothing is done to vary its nature or destroy its original quality. Had the demand been of a different description, as for the delivery of goods, and the award had directed a payment of money in satisfaction of the demand, it might then have been said

that the award had changed the nature of the original demand, that the right to have the goods was gone, and the only right remaining was the substituted right, *i. e.* the right to have the money; or, had the demand been for a debt, and the award had directed not payment in money, but payment in a collateral way, as by delivery of goods, performance of work, &c., it might, perhaps, have been said, that the right to have payment in money was gone; but here the £13 is to be paid for the original demand, *i. e.* for the tolls, and it is to be paid as that demand was to have been paid, *i. e.* in money. In the case of Crofts *v.* Harris, Carth. 187, the declaration contained three counts: one, for not shipping and consigning cotton wool; one, upon an *indebitatus* for goods sold, with a conditional promise to pay in money, if the defendant did not ship and consign cotton wool to the plaintiff; and the third, upon a general *indebitatus assumpsit,* for goods sold; the defendant pleaded a submission of all matters, and an award thereon, which he set out, but he did not allege performance on his part; what the matter awarded was, whether the payment of money, or the performance of any other matter, does not appear. It turned out on demurrer, that the award related only to the cotton wool, not to the other matters; so that it was pleaded to what it could not bar, and, as to the cotton wool, it was conditional only, and therefore void. The plaintiff, therefore, had judgment. Carthew says, the following diversities were taken by the Court to be law: First, That an award without performance is a good bar to an action on the case, if the parties have mutual remedies against each other, to compel the execution of the matters awarded; and (after other two positions, not bearing upon this case), that if the award in that case had been general, the defendant might have pleaded it in bar of all the promises in the declaration, and it would not have amounted to the general issue. In this case, therefore, there was no decision upon the point. The position, that an award without performance would be a good bar to an action upon the case, would be within the distinction we have taken, if by an action on the case were meant, as it probably was, not an action for a debt, but a special action on the case for damages; and, as we are not apprised what the award there was, it does not follow, that, because the award in that case would have been a good bar, the award here, which is only an award of payment, is. In Allen *v.* Harris, Ld. Raym. 122, relied upon in Gascoyne *v.* Edwards, it is certainly said by counsel, *arguendo,* that arbitrament may be pleaded without performance, because the parties may have reciprocal remedies, and the Court is represented to have said, that "if arbitrament be with mutual promises to perform it, though the party has not performed his part, who brings the action, yet shall he maintain his action, because an arbitrament is like a judgment, and the party may have his remedy upon it." But this was not the point in judgment before the Court, the defendant had pleaded not

an arbitrament, but an accord, which was held bad; and the action was not an action for a debt, but an action of trover. The case of Gascoyne v. Edwards, 1 Younge & Jervis, 19, admits (if not of both answers we have mentioned) clearly of the first, viz. that the demand was for general damages, and not for a debt. The first count of the declaration, we have ascertained from the pleadings, was covenant for not repairing; the award was pleaded to that count only, and it directed the payment of £5 for damages, the repair of the premises, and the quitting them at a given period. The case therefore, according to the distinction we have taken, does not govern the present, because the action there was not for a debt, but for general damages for not repairing. Upon the ground, therefore, that the present action is for a debt, that the award only ascertains the amount of that debt, and that money payable under the award is nothing but the original debt so ascertained in amount, we are of opinion that this plea is bad, and that the plaintiff is entitled to judgment. *Judgment for the plaintiff.*

COMMINGS *v.* HEARD

In the Queen's Bench, July 25, 1869

[*Reported in Law Reports,* 4 *Queen's Bench,* 669]

Declaration containing indebitatus counts for work done and materials provided, for money paid, for the conveyance of goods, for interest and money due on accounts stated, and claiming 400*l.*

Fourth plea: Except as to the sum of 145*l.* 3*s.* 1*d.*, parcel of the money claimed, the defendant says that the plaintiff ought not to be admitted or received to claim or allege that at the commencement of this suit any more than the sum of 145*l.* 3*s.* 1*d.* was due from the defendant to the plaintiff in respect of the causes of action in the declaration mentioned, because the defendant says that after the accruing of the causes of action in the declaration mentioned, and before this suit, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement made between them before this suit they referred the question of how much was due from the defendant to the plaintiff in respect of the causes of action to the award of William Wills, and agreed to be bound by his award as to such amount; and that afterwards, and before this suit, the said William Wills, having taken upon himself the burden of the arbitration, and having heard and considered all that the plaintiff and defendant respectively had to allege, and all the evidence which they had to produce relating to the premises so referred, made his award in writing of and concerning the premises so referred to him as aforesaid, and thereby awarded that

the amount due from the defendant to the plaintiff in respect of the causes of action was 145*l.* 3*s.* 1*d.*

Demurrer and joinder.

Anstie, in support of the demurrer.

Jelf, contra.

Lush, J. This was a demurrer to a plea. [The learned judge read the plea.] It is to be observed that the plea does not profess to be an answer to the entire claim, but to the excess over and above the amount of 145*l.* The question is, whether the plaintiff is concluded by the award from alleging that the entire amount was due to him. I am of opinion that he is concluded, and that the award is binding between the parties in all matters which it professes to decide. It was contended that an award is not an estoppel, that the parties are not concluded by an award, and that it is distinguishable from a judgment, which, it is admitted, would have bound the parties. The contention was that it was so distinguishable because an award was an adjudication by a tribunal appointed by the parties, and not one constituted by the sovereign power within the realm. It is impossible, to my mind, to suggest any good ground of distinction between these two, when we consider that the reason why a matter once adjudicated upon is not permitted to be opened again is because it is expedient that there should be an end to litigation. When once a matter has been decided between parties, the parties ought to be concluded by the application, whatever it may be. I am at a loss to suggest any reason that would be applicable to the one, that would not be applicable to the other tribunal.

Several cases were cited which it was supposed were authorities in favor of the plaintiff, but which, I think, may be contended to be clearly authorities in favor of the defendant. It is not a new doctrine that an award is a bar. That is found in Comyn's Digest, Tit. Accord, D. 1; and there are several instances of it to be found in the books. The case of Allen *v.* Milner, 2 C. & J. 47, was relied on, on the part of the plaintiff. When that case is examined it will be found to differ from the present in a most essential particular. There the money demand had been referred to arbitration. The arbitrator has found a given sum to be due from one to the other. That case was a money demand, as this is; the action was brought on the original consideration, but the plea, unlike the plea in this case, set up the award as a bar to the entire action. The plea was held bad, and for this reason, that an award upon a money claim does not alter the nature of the original debt; it leaves it remaining due. The amount which the arbitrator found to be due was for the original consideration. The award did not change the nature of the debt, consequently a plea which professed to answer the whole of the debt, and admitted a part of it was due, was a bad plea. That is the ground of that decision.

On the other hand, it is settled, where the claim is one for un-

liquidated damages, an award which settles the amount may be pleaded in bar to the entire action, although the plea, on the face of it, shows that the money is not paid. In the case of Gascoyne *v.* Edwards, 1 Y. & J. 19, there was a general plea pleaded to the whole declaration, by which it was alleged that the parties had agreed to refer the amount of the damages to arbitration, and an award had been made, by which it was awarded that the defendant should pay the plaintiff 5*l.* to put the premises in repair. The plea, although it did not aver that the 5*l.* was paid, was held to be a good plea because an award, fixing the amount and creating a debt between the parties, extinguished the original demand for unliquidated damages. The principle upon which this was held a good plea is, that an award, professing to determine the matter, is binding upon both parties, and it as much precludes the parties from alleging anything contrary to the award as a judgment would, on the ground that it is *res judicata*. If this action had been brought upon the award, it is clear the defendant would be precluded from saying the 145*l.* was not due, because the arbitrator found it was. Why is not a plaintiff equally prohibited from alleging that more is due when the amount has been found by the arbitrator? Each must be concluded by the finding. It is elementary knowledge that an award, good on the face of it, is binding and conclusive upon both parties to it until it is set aside. Nothing appears on the face of this plea to show that the award is not perfectly good. It professes to adjudicate upon all matters referred, and it has decided finally the whole matter. In answer to the argument that the award may be bad, it is enough to say that if the award is bad it might be shown by a replication setting it out. If it is not bad on the face of it, then the parties not having moved to set it aside, it stands, and each party is prohibited from objecting to it. The plea is a perfectly good plea, and our judgment must be for the defendant.

The plea, no doubt, is in an unusual form, because it is pleaded by way of estoppel. It begins in the ordinary way of a plea of estoppel, that the plaintiff ought not to be admitted or received to say so and so. That I consider immaterial. The award is a bar, and it concludes the parties.

Hayes, J. I quite agreed that this plea is good, although pleaded in form of an estoppel, but upon consideration I think it is a plea in bar, and in truth, a plea to the merits. It is pleaded, not to the whole of the demand, but only to the excess beyond the amount found by the arbitrator. It is objected that the plea is bad because it does not show that the sum awarded has been paid. We have not the whole record before us, and for anything we know, the money may have been paid into court.

The cases that were cited on both sides clearly show the plea to be good. In Whitehead *v.* Tattersall, 1 A. & E. 491, an action was brought on a covenant. It appeared that before action the plain-

tiff and defendant had agreed to refer to arbitration a dispute relating to the repairs of certain premises, and the referee had ascertained the amount of the dilapidations. That case was before the new rules of pleading. The defendant pleaded *non est factum,* and the award was held to be conclusive as to the amount of damages to which the plaintiff was entitled for the breach of covenant. The court said the award was binding on the plaintiff, and therefore, on the defendant. Taunton, J., says: "The award of an arbitrator concludes the right, unless you can impeach the award." Therefore the award there was held conclusive with respect to the amount of damages. Parkes *v.* Smith, 15 Q. B. 297, 19 L. J. (Q. B.) 405, seems to me to be quite undistinguishable from the present. It was pleaded that the award of the arbitrator was conclusive on both parties, and it was contended that it was a matter of estoppel, and ought to be pleaded as estoppel; but the court thought it was a matter in bar, and not a matter of estoppel. Coleridge, J., pointed out the distinction, and said the defence was that there was no cause of action, and not that, admitting a cause of action to exist, the plaintiff was estopped from setting it up. The plea in that case did not allege a payment of the sum found to be due by the arbitrator. Therefore it seems to me this case is not distinguishable from Parkes *v.* Smith, 15 Q. B. 297; 19 L. J. (Q. B.) 405. In the case of Allen *v.* Milner, 2 C. & J. 47, the plea was held bad because it was pleaded to the whole cause of action. It admitted that the amount found by the arbitrator was due, but did not show that the plaintiff's claim in respect of it was answered. There is this difference between the cases: In the present case the plea is pleaded to the excess of what the arbitrator found to be due. We do not know what has taken place as to the 145*l.* 3*s.* 1*d.;* all we know is, that the excess to which the plea is directed has been found by the arbitrator not to be due, and both parties are bound by the finding. Therefore, whatever the form of the plea, it would not be bad, because pleas are not governed by their beginning and by their ending, but by the substance of them. Therefore this is substantially a good defence to the action. *Judgment for the defendant.*

BOSTON AND LOWELL RAILROAD CORPORATION *v.* NASHUA AND LOWELL RAILROAD CORPORATION

SUPREME JUDICIAL COURT OF MASSACHUSETTS, March 5–June 22, 1885

[*Reported in* 139 *Massachusetts,* 463]

CONTRACT upon an award of arbitrators. The agreement of submission, dated September 30, 1882, and signed by the parties, recited that certain disputes and differences had arisen between them

concerning their rights under or growing out of a certain joint traffic contract entered into in 1857, and which continued for twenty years from October, 1, 1858; and that the Nashua and Lowell Railroad Corporation, on April 17, 1880, brought a bill in equity in the Circuit Court of the United States for the District of Massachusetts for the recovery of the sums claimed to be due to it. Then followed this recital: "And whereas, it has been agreed by and between the said parties to said suit to refer the said claims and all other claims now existing in favor of either party against the other to arbitration, upon the understanding that said arbitrators shall be governed in their determination and award by the rules of law applicable to the case, but without prejudice from any defence based on the statute of limitations, unless such defence would be good and valid in law if pleaded to the bill in equity aforesaid, commenced April 17th, 1880." The agreement then stated that the parties submitted all demands of either against the other which originated before October 1, 1880, to the determination of Elias Merwin, William S. Gardner, and Waldo Colburn, "the award of whom, or of the greater part of whom, shall be final; and if either of the parties neglects to appear before the arbitrators, after due notice of the time and place appointed for hearing the parties, the arbitrators may proceed in its absence, and the arbitrators may make such award respecting costs and expenses as they shall judge reasonable, including a compensation for their own services; and the parties further agree that they will respectively obey, observe, perform, fulfil, and keep the award of the said arbitrators of and concerning the premises. It is understood and agreed that the same rule and limitation of time as to the statute of limitations shall govern the arbitrators aforesaid, if said statute is pleaded by either party."

Annexed to the agreement were certain exhibits, containing a statement of the claims of the respective parties. On August 7, 1883, the arbitrators signed their award. The instrument began by stating that the arbitrators met the parties on February 23, 1883, and proceeded as follows: "It was then agreed by the said parties that it was desirable that the arbitrators should first hear, consider, and determine the claims of the Nashua and Lowell Railroad Corporation marked 'Numbers 3, 4, 5, and 6,' in their statement of claims annexed to said agreement, entitled Exhibit 1, before entering upon a hearing of any other claims of either party under said submission, and, with the consent, and at the request of both parties, the arbitrators thereupon, and upon subsequent days, namely, on the twenty-fourth and twenty-sixth days of February, 1883, proceeded to hear the respective claims of the Nashua and Lowell Railroad Corporation, at each of which hearings the respective counsel aforesaid were present, and having fully heard and considered the respective proofs and arguments of the said parties in reference thereto, the subscribers, on the twenty-third day of May, 1883, at Boston, made

their final award and determination in respect to said claims, and announced the same to the said parties who were present by their said counsel, in the words following, namely: —

" 'Several of the claims made by the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation were by consent of both parties submitted to the referees for their award and determination, with the understanding and reservation that the remaining claims made by the respective parties were to remain open, either for adjustment by the parties themselves, or for future hearing and determination by the referees. The items submitted to the referees, and upon which they have been requested to pass, are those numbered 3, 4, 5, and 6 in Exhibit 1, annexed to the agreement of reference. The referees have considered these items, and are of the opinion, and so award and determine, that the Nashua and Lowell Railroad Corporation is not entitled to recover anything from the Boston and Lowell Railroad Corporation in respect to either of said items.' "

The award then stated that the hearing of any other claims under the submission "was then by agreement of all parties" adjourned to June 29, 1883; that, at a hearing on the day to which the matter had been adjourned, the counsel for the Nashua and Lowell Railroad Corporation presented a motion for a rehearing as to the law involved in the fifth claim, and in so much of the sixth claim as accrued after June 25, 1877; that this motion was overruled; that the further hearing was adjourned until August 1, 1883; and that on July 30, 31, each of the arbitrators received from the Nashua and Lowell Railroad Corporation certain papers, copies of which were annexed to the award.

The first paper purported to contain a vote of the directors of the defendant corporation, passed July 5, 1883, which, after reciting the proceedings before the arbitrators, proceeded as follows: "Now, therefore, resolved, under the circumstances above set forth, that this corporation will revoke said submission, and refuse to proceed further under the same, unless the referees will either make a special report of their findings of fact and rulings of law in relation to the fifth claim, and that portion of the sixth arising after May, 1877, or else unless this corporation shall be permitted to amend the said submission by striking out or withdrawing therefrom the said fifth claim, and that portion of the sixth claim which has accrued or arisen since the vote of June 25th, 1877."

The second paper, dated July 30, 1883, was signed by the corporate name of the defendant, by its president. It contained, after numerous recitals, the following: "Now, therefore, the Nashua and Lowell Railroad Corporation, in pursuance of said vote, does hereby revoke the said submission and all authority therein and thereby conferred upon Elias Merwin, William S. Gardner, and Waldo Colburn, as arbitrators named therein, and does hereby terminate,

so far as it lawfully may, any and all power heretofore given them to act under the said submission."

The award then stated, that on August 1, 1883, the arbitrators met the parties, according to adournment; and that the counsel for the Nashua and Lowell Railroad Corporation handed to the arbitrators a paper of which the following is a copy: —

"At a meeting of the directors of the Nashua and Lowell Railroad held at Boston, August 1, 1883, at nine o'clock in the forenoon, the president having laid before the board a copy of an instrument of revocation of the submission entered into on the 30th day of September last, between this company and the Boston and Lowell Railroad Corporation, said submission being executed by him in behalf of this company, in pursuance of the directors' vote of July 5th last, it was voted that the course so taken by him be ratified and approved, and that the directors will treat the said submission as no longer in force.

"A true extract from the record. Attest: W. W. Bailey, Clerk."

The award then stated that the arbitrators were of the opinion that they were bound to proceed with the hearing if either party so desired, and so informed the parties, and that they were ready to hear them; that the counsel for the Nashua and Lowell Railroad Corporation stated that that corporation did not intend to proceed further, and that he then withdrew.

The award then stated the further proceedings before the arbitrators, and concluded with a "summary," which began as follows: —

"The subscribers, having fully heard the respective parties under said submission, so far as they desired to be heard, and having fully considered their respective proofs and arguments, do now, in addition to their final award and determination of May 23, 1883, as hereinbefore set forth, award and determine, and this is our final award and determination in the premises, namely: —

"1. That the Nashua and Lowell Railroad Corporation is not entitled to recover any sum of the Boston and Lowell Railroad Corporation by reason of any of the claims specifically made by it or embraced by said agreement of reference against said Boston and Lowell Railroad Corporation."

Then followed an award in favor of the Boston and Lowell Railroad Corporation, on their claims, to the amount of $12,148.88.

Trial in the Superior Court, before Mason, J., who allowed a bill of exceptions in substance as follows: —

There was contradictory evidence whether the statement of the arbitrators contained in the clause beginning "Several of the claims," and ending with the words, "by the referees," was correct, the defendant insisting that such statement was not correct, and the plaintiff insisting that it was correct. The other facts stated in the award were not in dispute.

The defendant took the ground that the only assent given by it

was to the determination by the arbitrators in the first instance of certain questions of law as preliminary, and that they might pass upon such legal questions, and announce the result, before proceeding to consider other claims embraced in the submission, and before passing upon such other claims, and that the defendant never assented to any partial and final award being made, so as to be binding on the defendant before the revocation was notified to the arbitrators. The plaintiff contended that the statement in the award was true.

Thereupon the defendant contended, and requested the judge to rule as follows: "1. The clause in the submission stating that it was entered into 'upon the understanding that said arbitrators shall be governed in their determination and award by the rules of law applicable to the case, operated as a limitation or restriction of the power of the arbitrators, so that their determination of matters of law was not final. 2. If the arbitrators treated the submission as making them final judges of all questions of law raised before them, and undertook to pass finally upon all matters of law laid before them, and did so in such a way that the defendant was deprived of all means of revising their legal rulings except by revoking the said submission, and the defendant did revoke the submission for that reason, then such revocation was legally justifiable. 3. Whether the defendant's revocation of the submission in this case was legally justifiable or not, it operated to deprive the arbitrators of all further power of action under the same."

The plaintiff asked the judge to rule, whatever he might find upon the question of fact in dispute, that the plaintiff was entitled to a finding in its favor for the amount of the award, and interest on the same; but the judge declined so to rule.

The judge refused to give the first two rulings requested by the defendant, but did give the third ruling requested, and thereupon found for the defendant. The plaintiff alleged exceptions.

A. A. Strout, for the plaintiff.

F. A. Brooks, for the defendant.

FIELD, J. The award on which this action was brought was in writing, and was signed and published by the arbitrators on August 7, 1883. Before the award was signed, the defendant delivered to the arbitrators a paper signed by the president of the defendant corporation in its name, dated July 30, 1883, and a copy of the vote of the directors of the corporation passed on August 1, 1883. These papers we construe to be an unconditional revocation by the defendant of the authority of the arbitrators to proceed under the submission. It is not contended that this revocation was waived or withdrawn by the defendant.

A submission to arbitration is a power which may be revoked at any time before it is executed by the publication of the award, and an agreement that the arbitrators may proceed *ex parte,* if

either party neglects to appear, does not make the submission irrevocable. Wallis *v.* Carpenter, 13 Allen, 19, 24; Marsh *v.* Bulteel, 5 B. & Ald. 507; Mills *v.* Bayley, 2 H. & C. 36.

The contention is, that the submission was partially executed by the award that the defendant was not entitled to recover anything from the plaintiff in respect to the items numbered 3, 4, 5, and 6 in the statement of claims made by the defendant. It does not appear that this was a separate award, actually reduced to writing and signed by the arbitrators. The unavoidable inference is, that this conclusion was announced to the parties as the determination of the arbitrators upon these items; and that the meeting of the arbitrators was adjourned for the purpose of subsequently hearing and determining the other claims of the parties, unless meanwhile the parties settled them.

An award must cover all the claims submitted and presented to the arbitrators, and must be mutual, certain, and final. If we assume that the oral announcement of the arbitrators of their determination upon these items was intended to be their final award on these items, the award would be bad, unless the parties had agreed that these items should be the subject of a separate award, because this award did not decide all the substantial matters submitted and presented. Randall *v.* Randall, 7 East, 81; Robson *v.* Railston, 1 B. & Ad. 723; Stone *v.* Phillipps, 4 Bing. N. C. 37; Bhear *v.* Harradine, 7 Exch. 269.

It has not been found as a fact, that the parties agreed that these items should be the subject of a separate award. If this fact were found, it would perhaps show that the parties, by their subsequent agreement, entered into two separate submissions instead of one; but then the making and publishing of an award under one submission would not be a part execution of the power conferred by the other. But if it be assumed that the statement in the award is true, we are of opinion that the award itself does not show that the announcement of the determination of the arbitrators upon the items mentioned was intended by them as the making and publication of an award. The award, as it was finally made and published, is one and entire. The power of the arbitrators over all the matters submitted, if there had been no revocation, would have continued until the award was finally made and published. Before this was done, it was competent for them to change their minds upon these items, to rehear the parties, and to revise their decision. The announcement was interlocutory, and not final. It is therefore unnecessary to consider whether any partial award, made and published under a submission such as this is, would preclude a party from revoking the authority of the arbitrators to proceed, under the submission, to consider and determine the remainder of the matters submitted. *Exceptions overruled.*[1]

[1] In Tobey *v.* County of Bristol, 3 Story, 800, 819, STORY, J., said: "But supposing it to be otherwise and here there was a real contract or agreement, not conditional

WILLIAMS *v.* THE LONDON COMMERCIAL EXCHANGE COMPANY

IN THE EXCHEQUER, MICHAELMAS VACATION, 1854

[*Reported in* 10 *Exchequer*, 569]

THE first count of the declaration stated, that the plaintiff employed the defendants in the way of their business as share-brokers, for commission to be paid by the plaintiff to the defendants in that behalf, to purchase for the plaintiff, when and as soon thereafter as the defendants could, one hundred shares in the Great Northern Railway Company, as the market price of such shares for the time being; and although the defendants then could and ought to have purchased for the plaintiff such shares, at the then market price thereof, the defendants did not then purchase such shares, or any part of them, but fraudulently and wrongfully neglected and omitted to do so, &c. — There were other counts in respect of other shares.

Plea — That, after the accruing of the causes of action in the declaration mentioned, and before the making of the agreement hereinafter mentioned, disputes and differences were existing be-

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but absolute, on the part of the commissioners, to refer the claims to arbitration, can such an agreement be enforced by a court of equity? No one can be found, as I believe, and at all events, no case has been cited by counsel, or has fallen within the scope of my researches, in which an agreement to refer a claim to arbitration, has ever been specifically enforced in equity. So far as the authorities go, they are altogether the other way. The cases are divided into two classes. One, where an agreement to refer to arbitration has been set up as a defence to a suit at law, as well as in equity; the other, where the party as plaintiff has sought to enforce such an agreement in a court of equity. Both classes have shared the same fate. The courts have refused to allow the former as a bar or defence against the suit; and have declined to enforce the latter as ill-founded in point of jurisdiction. In respect to the former class, I will barely refer to Wellington *v.* Mackintosh, 2 Atk, 569, Mitchell *v.* Harris, 4 Bro. Ch. R. 311; s. c. 2 Ves. Jr. 129, Kill *v.* Hollister, 1 Wils. R. 129, Street *v.* Rigby, 6 Ves. 815, and Thompson *v.* Charnock, 8 Term R. 139. In respect to the latter class. In Street *v.* Rigby, 6 Ves. R. 813, 818, LORD ELDON significantly said, that no instance is to be found of a degree for specific performance of an agreement to name arbitrators, or that any discussion upon it has taken place in experience for the last twenty-five years; and he referred to the case of Price *v.* Williams, before LORD THURLOW, in which he, LORD ELDON, was counsel, where LORD THURLOW held, that the court could not perform such an agreement. I do not find in the very brief and unsatisfactory reports of the case of Price *v.* Williams, 3 Bro. Ch. R. 163, and 1 Ves. Jr. R. 365, any notice of this point; but there cannot be any serious doubt of the accuracy of LORD ELDON'S recollection of the case. In Gourlay *v.* The Duke of Somerset, 19 Ves. R. 430, SIR WILLIAM GRANT, one of the greatest masters of equity of his age, expressly said, that a bill seeking to enforce the specific performance of an agreement to refer to arbitration, was a species of bill that has never been entertained by a court of equity. There are several other cases bearing strongly on the same doctrine, such as Milnes *v.* Gery, 14 Ves. 400, Blundell *v.* Brettargh, 17 Ves. 232, and Wilks *v.* Davis, 3 Meriv. R. 507. But a later case, directly in point, is Agar *v.* Macklew, 2 Sim. and Stu. R. 418, where SIR JOHN LEACH utterly refused to decree the specific performance of an agreement to refer to arbitration. On that occasion, he said: 'I consider it to be quite settled, that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will it, in such a case, substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement.'" See further Ames Cas. Eq. Jur. 65–68; 3 Williston, Contracts, §§ 1421, 1719, 1925.

tween the plaintiff and the defendants touching and concerning divers dealings and transactions which had taken place between them, and touching certain matters of account arising out of those dealings and transactions; and that some of the said matters consisted of the several transactions in the declaration mentioned as to the direction to purchase shares for the plaintiff, and others of such matters were the subject of an action then depending in this Court by the plaintiff against the defendants for damages claimed by the plaintiff in respect of certain other dealings between the plaintiff and the defendants, and certain other directions by the plaintiff to the defendants to purchase for the plaintiff certain other shares. Whereupon, the said disputes and differences then existing and the said action depending as aforesaid, it was agreed between the plaintiff and the defendants, that, in consideration that the defendants would consent to a judge's order, by which the matters of the said action should be referred to the award of C. C., and that the defendants would agree to perform in all things his award, to be made of and concerning the matters so to be to him referred, so far as the same award should direct performance to be made by the defendants, the plaintiffs should and would accept such agreement by the defendants in full satisfaction of all damages sustained by the plaintiff for and in respect of the several causes of action in the declaration in this action alleged. — Averments: That, in pursuance of the said agreement, a judge's order in the said then depending action was consented to by the defendants, and was made by Sir T. J. Platt, Knight, one of the Barons of this Court, whereby, and by consent of the plaintiff and the defendants, the matters of the said then depending action were referred to the award of the said C. C., and whereby it was ordered that the costs of the said cause should abide the event of the said award, &c.; and the plaintiff did then accept such consent and such order made in pursuance of the said agreement, in full satisfaction and discharge of all damages by the plaintiff sustained for and in respect of the several causes of action in the declaration in this present action alleged. — The plea then proceeded to state that the arbitrator made his award, and found for the plaintiff, damages, £423 9*s.* 6*d.*, which the defendants paid to the plaintiff, with costs.

Demurrer, and joinder therein.

Willes, in support of the demurrer. — The plea is bad, as an accord without satisfaction. An agreement to refer to arbitration an action then pending cannot operate as a satisfaction or release of other causes of action not included in that reference. [PARKE, B. — There is good consideration for the plaintiff's relinquishing those claims. The defendants consent to refer the action by a judge's order, which may be enforced by attachment. MARTIN, B. — Suppose a person has two claims against another, and he says to the latter, "If you will consent to refer the one claim, I will give up

the other," surely such an agreement would be binding.] An accord must appear to be advantageous to the party, otherwise it is no satisfaction: Bac. Abridg. tit. "Accord and Satisfaction" (A.) This reference is not more advantageous to the plaintiff than it is to the defendants. It cannot be considered that either party obtains by it more than he is justly entitled to in respect of the matters referred; consequently, there is nothing in satisfaction of the claims not included in the reference. [PARKE, B. — The matters in question could not have been referred unless by consent of both parties. Then, as it appears that there was a binding agreement to refer, that is a satisfaction of the other claims.]

Barstow appeared in support of the plea, but was not called upon to argue.

PER CURIAM.[1]—There must be judgment for the defendants.

Judgment for the defendants.

CALVIN ROBINSON *v.* FERDINAND HAWKINS

VERMONT SUPREME COURT, FEBRUARY TERM, 1866

[*Reported in* 38 *Vermont,* 693]

PECK, J.[2] [The action is trespass for the taking and conversion of a cow. The defendant justified as deputy sheriff under a writ of attachment in favor of one Gilson. The plaintiff claims that the cow was his only cow and therefore exempt. The referee so finds the fact.]

The defendant relies on a submission and award of an arbitrator between the plaintiff and Gilson, as a bar to the action. It appears that in 1858, while the suit in which the cows were attached was pending in the county court, to which it had been appealed, Calvin Robinson, 2d, and his father, William Robinson, and Gilson executed mutual bonds of submission to arbitration, in pursuance of which an award was made in May, 1859. The arbitration bonds specify as a matter of difference submitted, a "disagreement relative to the sale and purchase, or rent and occupancy, of certain premises, wherein the said Gilson claims damages of said Calvin Robinson, which disagreement has resulted in a suit at law" (referring to the suit already mentioned), and also specifying a claim on the part of the said William Robinson, that Gilson has, by deputy sheriff Hawkins, attached a certain cow claimed by William Robinson as his property, for which Robinson has a suit pending against Gilson.

[1] PARKE, B. PLATT, B., and MARTIN, B.

[2] The statement of facts in the opinion is abbreviated and a portion is omitted.

To this particular description of the matters submitted is added a general clause of all matters existing between Gilson and William Robinson, and between Gilson and Calvin Robinson. The defendant's counsel insists that, under this general clause, the plaintiff was bound to present the claim embraced in this suit before the arbitrator and have it there adjudicated, and that if he neglected to do so he is barred of all remedy, not only as against Gilson but as against this defendant. We recognize the principle established by the cases cited in argument, that under a general submission of all matters existing between the parties, if a party withholds a part of his claims from the arbitration he cannot, as a general rule, afterwards enforce it against the other party to the submission. Whether this rule is limited to cases where a party, in bad faith and intentionally in violation of his contract, withholds a claim, it is not necessary to decide. Nor is it necessary to decide what exceptions there are to this rule as between the parties to the submission. It is sufficient to say that, in the opinion of the court, the neglect of the plaintiff to present this claim before the arbitrator does not operate to bar him from his remedy against the defendant, who was no party to the submission. The cases on this subject, in which it is held that the party is concluded, proceed upon the ground that the party was bound, by his contract of submission, to present the claim and have it adjudicated by the arbitrator. We think in this case the plaintiff was not bound by the submission to present the claim before the arbitrator, but had a right to look to the officer who actually committed the trespass. It is true he might have made Gilson liable for the acts of the officer if he could have shown that Gilson directed the officer to attach and sell the particular cow in question, but he was not bound to resort to him instead of the officer for remedy. The submission and award is no bar to a recovery, without showing that the matter was submitted to and adjudicated by the arbitrator, and this the referee says he does not find.

The defendant's counsel claims that the presumption is that it was presented to, and adjudicated by, the arbitrator, unless the contrary is shown. This would be so if by the terms of the submission it became the duty of the plaintiff to present it to the arbitrator, but not so in this case.

SECTION VI

SURRENDER AND CANCELLATION

CROSS *v.* POWEL

IN THE COMMON PLEAS, Trinity Term, 1596

[*Reported in Croke Elizabeth,* 483]

DEBT. The case was, A deed-poll was made between Cross and Powel, whereby Cross covenants with Powel to assure unto him such land, and Powel by the same deed covenanted with Cross to pay unto him for it £40. Powel delivered the deed first to Cross, and Cross afterwards delivered it to Powel. Cross brings debt for this £40. And all this matter being disclosed by pleading, it was thereupon demurred by the defendant, pretending, that by this re-delivery of the deed unto him it had lost its force. — But all the Court held, that it is a good deed to both; for here is a writing, sealing, and delivery, and the delivery thereof to the defendant is not material: for if a deed be delivered to be cancelled, to the party himself, yet if it be not cancelled, and the other gets it again, it remains a good deed. Wherefore it was adjudged for the plaintiff.

ALBERT'S EXECUTORS *v.* ZIEGLER'S EXECUTORS

PENNSYLVANIA SUPREME COURT, 1857

[*Reported in* 29 *Pennsylvania State,* 50]

KNOX, J. We are of opinion that the Court of Common Pleas erred in permitting the jury to find under the evidence, that the single bill upon which this suit was brought, did not truly express the contract between the parties to it.

There was no evidence of either fraud or mistake in the execution and delivery of the instrument, and therefore it could not be contradicted or varied by parol. The plaintiff has the right to a trial upon the basis that the contract was correctly set forth in the instrument upon which the suit was brought. That instrument was in the following words: —

"Know all men by these presents, that I, John Ziegler, of Latimore township, Adams county, Pennsylvania, do promise to pay to Jacob Albert, of the same place aforesaid, the full interest of $1500, one year and every year until the said Jacob Albert's decease: I,

John Ziegler, bind myself, my heirs, executors, and administrators for the same, it being for value received, as witness my hand and seal the first day of April, A. D. 1833.

Signed, "JOHN ZIEGLER, [L. S.]"

Jacob Albert died on the 5th September, 1851; so that, according to the terms of the contract, the plaintiff was entitled to recover the interest on $1500, from the first day of April, 1833, to the 5th September, 1851. But the defendant alleges that the instrument upon which the suit was brought, was cancelled by Jacob Albert in his lifetime: first, by an indorsement upon the back of the paper; and second, by his direction to have the paper burned.

The indorsement was without date and was not signed, but was proved to be in the handwriting of the present plaintiff, who was the executor and the only person interested in the estate of Jacob Albert. It was as follows: —

"This within obligation after my decease shall be of no effect, but till then to be and remain in full force and virtue."

Whether this indorsement was made by the direction of the testator, was a question of fact for the jury. If so made, its legal effect was for the court. The plaintiff asked the court to instruct the jury that the indorsement, even if proved to have been made by the holder, would not amount to a release of the interest stipulated to be paid; to which an affirmative answer was given. This was correct. For although the bond could be released in equity by parol, it could only be done by delivery and upon sufficient consideration. That natural love and affection is not a sufficient consideration, is conclusively established by the cases of Kennedy's Executors *v.* Ware, 1 Barr, 445, and *In re* Campbell's Estate, 7 Barr, 100. And that there was no delivery is proved by the indorsement itself, for the bond was to remain good until Jacob Albert's decease.

The reason why a parol release of a sealed instrument is good in equity, is because it is there treated as an agreement not to sue, and is executed specifically by a perpetual injunction. But there must be a contract to release, founded upon a sufficient consideration, otherwise it is at the most only an executory gift, subject to the control of the donor, and which can neither be enforced against him nor his personal representative. It is clear, therefore, that the indorsement upon the single bill was not a valid release of the debt, nor would the mere unexecuted testamentary direction for the destruction of the instrument amount to an extinguishment of the debt. But the cancellation of a bond, or its delivery to the obligor, or even to a stranger, with the intent that it shall be cancelled, amounts to an extinction of the debt: Licey *v.* Licey, 7 Barr, 251. If therefore the jury should be satisfied upon another trial, that

Jacob Albert in his lifetime gave the bond in question to his grandson, Hiram Albert, and told him to burn it, it would in effect be cancelled and the debt extinguished; and the subsequent preservation of the bond, and the institution of this suit upon it by John E. Albert against the manifest intention and express direction of his father, would be a fraud upon the estate of John Ziegler, which could not be permitted to succeed in a court of justice. If however this allegation is not satisfactorily established, we see nothing in the case, as now presented, which would prevent the plaintiff from recovering the amount of his claim.

The indorsement upon the single bill, that it should be of no effect after the holder's death, as well as the declarations of Jacob Albert testified to by John Trump, Jacob Furst, Lewis Myers, and others, although not evidence to vary the written instrument, nor to establish an independent defence, may properly be received as corroborative to the testimony of Nelson Day. For the often repeated declarations of the plaintiff's testator, that he did not intend to claim anything upon the bond from the estate of his deceased son-in-law, John Ziegler, tends to the more ready belief in his direction for its destruction.

Judgment reversed and venire de novo *awarded.*[1]

MARSTON, ADM., Appellant, *v.* MARSTON & Another

New Hampshire Supreme Court, June, 1866

[*Reported in* 64 *New Hampshire,* 146]

Appeal, from a *pro forma* decree of the judge of probate, charging the appellant with the amount of two notes signed by Orissa J. Pillsbury, two notes signed by L. D. Kelly, and one note signed by Anson R. Marston, all payable to his intestate, Mercy Marston.

Aldrich & Remich, for the appellant.

Drew & Jordan and *R. Farnham,* for the appellees.

Smith, J.[2] In November, 1878, Mrs. Marston made known her desire and purpose to give to her son the plaintiff, and to her daughter Mrs. Pillsbury, the promissory notes which she held against them. That purpose she understandingly carried into effect by the transfer to them of the possession of the notes, without condition or reservation. The transaction was intended by her and understood by them to be a complete delivery of the notes, operating as an absolute extinguishment of all claim against them as signers of the notes. None of the elements to constitute a valid gift *inter vivos*

[1] Surrender of a bond to the obligee with intent to extinguish the obligation has the intended effect. Hurst *v.* Beach, 5 Madd. 351; Beach *v.* Endress, 51 Barb. 570; Picot *v.* Sanderson, 1 Dev. 309; Wentz *v.* Dehaven, 1 S. & R. 317; Licey *v.* Licey, 7 Pa. St. 251.

[2] Most of the statement of facts and a portion of the opinion have been omitted.

were wanting. The gift was by a person competent to give, of property she had a right to give, to persons competent to receive, and was completed by an absolute and unconditional transfer of the possession of the thing given. The gift having been perfected by delivery and acceptance, became an executed contract, founded in mutual consent, irrevocable by the donor, and the notes became the absolute property of the donees. Creditors only could interfere, but there is no suggestion that there were any.

The redelivery of the notes to Mrs. Marston subsequently on the same day was not a revocation of the gift, for it is found as a fact, and the paper drawn up by Mr. Herbert and signed by her shows, that the parties did not understand that the gift was revoked, and did not intend to revest the title to the notes in her, except in the contingency which has never happened. Nor was the redelivery a gift *inter vivos* from the children to their mother; the facts show that was not what the parties intended; and besides, a gift of the donor's promissory note may be avoided. If the reissue of the notes was intended as security for their agreement to support their mother, the answer is, there was no valuable consideration for the agreement. 3 Pars. Cont. 362.[1]

Decree of probate court reversed.

DARLAND *v.* TAYLOR

IOWA SUPREME COURT, December 6, 1876

[*Reported in* 52 *Iowa*, 503]

DAY, J. [The plaintiff as administrator of Alsey Darland sues for the price of a certain piece of land sold by her to the defendant. Promissory notes were given by the defendant for this money, but shortly before her death Alsey Darland destroyed the notes, and informed her son of the fact, and that she had done it because she did not want the defendant to have those notes to pay on her death. There was no evidence that the defendant knew of the destruction. The court below gave judgment for the plaintiff.][2]

The court grounded the opinion that the declaration of the donor is in itself insufficient to establish a gift. Burney *v.* Ball, 24 Ga., 565. What is there said upon the subject is as follows: "Our opinion

[1] Surrender of a note to the maker with intent to extinguish it has the intended effect. Sherman *v.* Sherman, 3 Ind. 337; Gibson *v.* Gibson, 15 Ill. App. 328; Denman *v.* McMahin, 37 Ind. 241, 246; Peabody *v.* Peabody, 59 Ind. 556; Slade *v.* Mutrie, 156 Mass. 19; Stewart *v.* Hidden, 13 Minn. 43; Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265; Larkin *v.* Hardenbrook, 90 N. Y. 333; Jaffray *v.* Davis, 124 N. Y. 164, 170; Kent *v.* Reynolds, 8 Hun, 559; Bridgers *v.* Hutchins, 11 Ired. 68; Melvin *v.* Bullard, 82 N. C. 33; Dittoe's Adm. *v.* Cluney's Ex., 22 Ohio St. 436; Ellsworth *v.* Fogg, 35 Vt. 355; Lee's Ex. *v.* Boak, 11 Gratt. 182. See also Uniform Neg. Inst. Law, §§ 119, 120.

[2] The statement of facts in the opinion has been abbreviated.

is that the declarations of the donor that he had given are always admissible in evidence in cases of this sort. We have heretofore held, and still hold, that they are insufficient of themselves to establish a gift. To constitute a good and valid gift there must be a delivery, actual or constructive, or, as it is termed sometimes, symbolical, or a writing." It is evident from the foregoing that the court simply determined that the declarations of a donor that he had made a gift are not sufficient without some proof of delivery, actual or constructive. It is not held, nor intimated, that the declaration of the donor is not admissible to establish the facts from which a delivery may be inferred. That such facts may be established by the declaration of the donor we do not doubt.

The court further held that there was no delivery or acceptance of the gift, and that both are necessary. The authorities hold that the delivery may be actual or symbolical. In Granigan *v.* Arden, 10 Johnson, 292, a father bought a ticket in a lottery, which he declared he gave to his daughter, and wrote her name upon it. After the ticket had drawn a prize he declared that he had given the ticket to his child, and that the prize money was hers. This was held sufficient to authorize a jury to infer all the formality requisite to a valid gift, and that the title to the money was complete and vested in the daughter. In Gardner *v.* Gardner, 22 Wendell, 525, a debt contracted by the wife was held to be discharged, as a gift, *causa mortis,* by the husband's destroying the bond, the evidence of the debt, and declaring that the money was hers. See, also, Blaisdel *v.* Locke, 52 N. H. 238.

In Hillebrant *v.* Brewer, 8 Texas, 45, where the father branded certain cattle in his son's name, and recorded the brand, it was held sufficient to establish a symbolical delivery. The destruction of the notes, together with the repeated declarations of the deceased that she did not intend the defendant to pay the debt, constitute a sufficient delivery under the authorities cited. As the gift was for the benefit of the donee and coupled with no condition, his acceptance of it, from all the circumstances proved, in the absence of any opposing testimony, must be presumed. Blaisdel *v.* Locke, 52 N. H. 238 (244).

The court further held that the gift was made by the donor in apprehension of death before morning, and that, as she did not die, there was a revocation of the gift. The evidence does not at all sustain the position that the gift was intended to be operative only in the event of the death of the donor before morning. Upon the contrary the evidence clearly shows that the deceased desired to discharge the defendant from liability upon the notes, and that the destruction of the notes was made at the time in question because she feared that she might die before morning, and thus be prevented from discharging the defendant as she desired. Afterward, and during her last sickness, and but a short time before death, the

deceased declared that she had destroyed the notes so that W. H. Taylor would get the property, and that she intended him to have it. There was not, we think, any revocation of the gift.

The evidence we think establishes a completed and valid gift, *causa mortis,* of the amount of the notes in question.

Reversed.[1]

SECTION VII

ALTERATION

HENRY PIGOT'S CASE

In the King's Bench, Trinity Term, 1614

[*Reported in* 11 *Coke,* 26*b*]

Benedict Winchcombe, Esq., brought an action of debt against Henry Pigot which was entered Trin. 11 Jac. Regis, Rot. 566, in Banco Regis on a bond made to the plaintiff in £60 2 Martii, anno 8 Jac. Regis. The defendant, without demanding oyer of the bond or condition, pleaded *non est factum.* And the jury gave a special verdict to this effect, that the bond was made to the plaintiff in the same manner as he had declared, and found the bond in these words, Noverint universi per præsentes nos Georgium Watkins Generos' Henricum Pigot de civitate Oxon' Draper, et Johannem Pyme de eadem civitate, Cordwayner, teneri et firmiter obligari Benedicto Winchcombe Armig' in 60 libris, &c. And in truth the plaintiff was Sheriff of the county of Oxford; and the condition of the bond was, that the said George Watkins should appear in the King's Bench *mense Paschæ* to answer to George Cottle in a plea of trespass; and that the said bond was delivered by the said Henry Pigot as his deed to the use of the plaintiff; and that after the delivery of the said deed hæc verba sequentia, videlicet (Vicecom' Comitatus Oxon') insert' et interlineat' fuerunt in eodem scripto post prædicta verba (Benedicto Winchcombe Armig') et ante prædicta verba (in sexaginta libris) superius in obligatione prædicta mentionat', sine notitia, Anglice the privity, seu mandat' prædict' Benedicti, et utrum super tota materia, &c. videbitur justic' et cur' hic quod scriptum præd' sit factum præd' Henrici necne iidem jur penitus ignorant, et petunt advisamentum cur' hic, &c.

[1] Destruction of a note operates as a discharge of the maker. Gilbert *v.* Wetherell, 2 Sim. & St. 358. McDonald *v.* Jackson, 56 Iowa, 643; Fisher *v.* Mershon, 3 Bibb, 527; Van Auken *v.* Hornbeck, 2 Green, 178; Blade *v.* Noland, 12 Wend. 173. So of a bond, Gardner *v.* Gardner, 22 Wend. 526; Bond *v.* Bunting, 78 Pa. 210, 218; Rees *v.* Rees, 11 Rich. Eq. 86. See also Uniform Neg. Inst. Law, §§ 119, 120.

And in this case these points were resolved: 1. When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum,* and give the matter in evidence, because at the time of the plea pleaded, it is not his deed.

Secondly, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void: as if a bond is to be made to the Sheriff for appearance, &c. and in the bond the Sheriff's name is omitted, and after the delivery thereof his name is interlined, either by the obligee or a stranger, without his privity, the deed is void: so if one makes a bond of £10 and after the sealing of it another £10 is added, which makes it £20, the deed is void: so if a bond is rased, by which the first word cannot be seen, or if it is drawn with a pen and ink through the word, although the first word is legible, yet the deed is void, and shall never make an issue, whether it was in any of these cases altered by the obligee himself, or by a stranger without his privity. So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed. *Vide* Dyer, 9 Eliz. fol. 261 b. And therefore in the principal case, the addition made by a stranger, without the privity of the plaintiff, being in a point not material for anything that appears to the court; for this cause, judgment was given for the plaintiff; and so you will the better understand the book in 14 H. 8, fol. 25 b.

And in this case it was moved at the bar, when a deed shall be good in part, and void in part: as to that, I conceive, there is a difference when a deed is void *ab initio,* and when it becomes void by misfeasance *ex post facto.* Also there is a difference when the deed, which is void in part *ab initio,* doth consist upon the entirety, and when upon divers several clauses: and in these also there is a difference, when the several clauses are absolute and distinct, and when they are several, and yet the one has dependency upon the other.

As to the first, it is unanimously agreed in 14 H. 8, 25, 26, &c. that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful; that in this case, the covenants or conditions which are against law are void *ab initio,* and the others stand good.[1]

But if a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation, or rasure, this misfeasance, *ex post facto,* avoids the whole deed, as it is held in 14 H. 8, 25, 26. For although they are several covenants, yet it is but one deed, 3 H. 7, fol. 5, a. If two are bound in a bond,

[1] A portion of the case is here omitted.

and afterwards the seal of one of them is broken off, this misfeasance *ex post facto* avoids the whole deed against both. *Vide* the case of Matthewson, Mich. 39 & 40 Eliz. in the Fifth Part of my Reports, fol. 23 a.[1]

DAVIDSON, Public Officer, &c., *v.* COOPER & BRASSINGTON

In the Exchequer Chamber, July 6, 1844

[*Reported in* 13 *Meeson & Welsby,* 343]

Lord Denman, C. J. This was a declaration in assumpsit on a written guarantee, to which one defendant pleaded, that, while the guarantee was in the plaintiff's hands, it was, without the defendant's consent or knowledge, materially altered by the addition of two seals opposite the names of the defendant and the other party to it, whereby its apparent nature and effect were wholly altered. Issue being taken on this plea, the jury found it was so altered; and judgment has been given by the Court of Exchequer for the defendant, after having discharged a rule for judgment, *non obstante veredicto,* upon argument.

After much doubt, we think the judgment right. The strictness of the rule on this subject, as laid down in Pigot's Case, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part. To say that Pigot's Case has been overruled, is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe, that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure, or interlineation, after

[1] In Bayly *v.* Garford, March, 125, the seals of two obligors on a joint and several bond had been eaten by mice and rats, but the seal of the defendant's testator had not been. The court "did strongly incline that judgment ought to be given for the defendant, and their reason was that if the obligee by his act or own lachesse discharge one of the obligors, where they are jointly and severally bound, that the same discharges them all, but gave day for the further debating of the case, for that this was the first time it was argued."

execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth cannot be known from inspection, but would require to be established by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy if the altered writing could be imposed on the contractor as genuine. We are therefore of opinion, both upon principle and authority, that this judgment must be affirmed.

Judgment affirmed.[1]

SECTION VIII

MERGER.[2]

HIGGENS'S CASE

IN THE COMMON PLEAS, MICHAELMAS TERM, 1605

[*Reported in* 6 *Coke*, 44 *b*]

IN debt by Randal and his wife, executrix of Themilthorp against Higgens, on a bond made to the testator, the defendant pleaded that the testator in vitâ suâ in curia de Banco hic recuperavit debitum prædictum, ac 60*s.* pro domnis (without alleging any execution), quod quidem recordum recuperationis, was removed extra Bancum per br. de errore coram Rege, & ibidem demanet minime reversatum seu adnullatum; and thereupon it was demurred. And it was objected, that if a man recovers debt on a bond, or rent on a lease for years, it is at the plaintiff's election to sue execution on that judgment, or to have a new action; and that for divers reasons. 1. By the judgment, the deed or rent is not changed, but continues a deed and a rent notwithstanding the judgment; as if a man be indebted in arrears on accompt, and takes a bond for the payment of them,

[1] The rule in Pigot's Case was applied to bills of exchange and promissory notes in Master *v.* Miller, 4 T. R. 320, 2 H. Bl. 141, and has been frequently applied to such instruments. See Ames Cas. B. & N., I. 447, Bills of Exchange Act, § 64.

In the United States, alteration by a stranger has been held not to avoid a contract. Ames Cas. B. & N., I. 447; 3 Williston Contracts, §1892. The Negotiable Instruments Law (§ 124) has, however, copied the English rule. See 16 Harv. L. Rev. 260; 3 Williston Contracts, § 1892.

The rule against alteration is applicable to simple written contracts. Powell *v.* Divett, 15 East, 29; Forshaw *v.* Chabert, 3 Brod. & B. 156; Nichols *v.* Johnson, 10 Conn. 192; Baxter *v.* Camp, 71 Conn. 245; Johnson *v.* Brown, 51 Ga. 498; Kline *v.* Raymond, 70 Ind. 271; Andrews *v.* Burdick, 62 Iowa, 714, 720; Davis *v.* Campbell, 93 Iowa, 524; Lee *v.* Alexander, 9 B. Mon. 25; Osgood *v.* Stevenson, 143 Mass. 399; Consaul *v.* Sheldon, 35 Neb. 247; Meyer *v.* Huneke, 55 N. Y. 412; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498; Cline *v.* Goodale, 23 Oreg. 406; American Pub. Co. *v.* Fisher, 10 Utah, 147; Schwalm *v.* McIntyre, 17 Wis. 232.

[2] See 3 Williston Contracts, §1918, *et seq.*

yet he may have an action on the one or the other, as it is agreed in 11 H. 4 and Mich. 2 Jac. Rot. 3272, in this court, in debt by Richard Branthwait against Sir William Cornwalleys the younger, on a bond for payment of money, the defendant pleaded in bar, *quod querens post diem solutionis pecuniæ,* and before the purchase of the writ did accept of a statute-staple for the same debt, and in full satisfaction of the bond, on which the plaintiff demurred: and it was adjudged for the plaintiff. For although he had taken a statute for the same debt, which is a matter of record, and of a higher nature than the bond is, yet the bond did remain in force; and it was in the plaintiff's election to take his action or remedy on the one or the other. 2. It was objected, that it would be against reason to compel the plaintiff to sue execution on the first judgment, for perhaps the plaintiff knows that the first judgment is erroneous, or that he has recovered by false oath, in which case the judgment is reversable by error, or attaint, and therefore if he should sue execution it would be in vain; for he ought to restore (when the judgment is reversed) all that which he has received. 3. It was objected, if in debt on a bond the defendant denies his deed, and it be found his deed, in that case the deed shall be delivered to the plaintiff, and the reason is, to the end that he may have a new action if he will: but if it be found not his deed, the deed ought always to remain in court, till the plaintiff has reversed the judgment. *Vide* 9 E. 4, 50 a, b. 4. If two be bound in a bond jointly and severally, and the obligee recovers against one of them on this bond, the nature of the bond is not so changed by this recovery but he may on the same bond have an action against the other. But it was resolved, that as long as the judgment remains in force, he cannot have a new action upon the same bond; for as he who has a debt by simple contract, and takes a bond for the same debt, or any part of it, the contract is determined, 3 H. 4, 17 b, 11 H. 4, 79, b, 9 E. 4, 50, b, 51, a. So when a man has a debt on a bond, and by ordinary course of law has judgment thereon, the contract by specialty which is of an inferior nature, is by judgment of law changed into a matter of record, which is of a higher nature. 2. If he who recovers may have a new action and a new judgment he may have infinite actions, and infinite judgments to the perpetual vexation and charge of the defendant and *infinitum in jure reprobatur.* 3. On every judgment the defendant shall be amerced, and if he be a duke, marquis earl, viscount or baron, he shall be amerced to one hundred shillings, and so the defendant might be infinitely amerced on one and the same obligation, which would be mischievous, and *interest reipublicæ ut sit finis litium.* And if a man has a liberty by prescription, and takes letters patent thereof, the matter of record drowns the prescription which was the inferior, as it is held in 33 H. 8 Br. Prescription 102. *Vide* 10 H. 7, 21, a, b, & 24, b, 2 E. 4, 14, b, 22 H. 6, 56, 8 H. 4, 16, 34 H. 6, 26, &c. And if a

man has an annuity by deed or prescription, and brings his writ of annuity and has judgment so long as this judgment doth remain in force, he shall never have a writ of annuity (although it be an annuity of inheritance), but a *Sc. fac.* on that judgment; because the matter of the specialty or prescription, is by the judgment altered into a thing of a higher nature. *Vide* 37 H. 6, 13, b, judgment in an action of forgery of a false deed, is a good bar in another action on the same forgery. But if recovery be in debt on a bond in the county by justices, there, notwithstanding such judgment, the plaintiff may have an action of debt on the bond in a court of record; for the county court is not of record, and therefore the bond is not changed into anything of a higher nature; but so long as such judgment remains in force the plaintiff shall not have another action by justices in the same court for infinite vexation of the party, as hath been said.

And as to the said case of Branthwait it was agreed to be good law; for a statute-staple, or bond in the nature thereof, is but a bond recorded, and one bond, be it of record, or not of record cannot merge another. Also a bond, and bond in the nature of a statute-staple are two distinct liens, made by assent of the parties without process of law, whereof the one hath no dependency on the other. But in an action brought on a bond, the suit is grounded on the bond, as a building upon a foundation; and the plaintiff hath judgment to recover the debt due by the bond; so that by judicial proceeding, and act in law, the debt due by the bond is transformed and metamorphosed into a matter of record; and judgment in a court of record is of a higher nature than a statute-staple, statute merchant, or any recognizance acknowledged by assent of the parties, without judicial proceeding. And as to the objection which was made, that perhaps the recovery is erroneous; to that it was answered, that that was the plaintiff's fault, and although it be erroneous, yet so long as it remains in force, it ought to be executed; and when it is reversed, then the obligee is restored to his new action on the bond. And it is true, that in old books, after judgment given in an action of debt on a bond; the bond shall be damned, because the duty was changed into another nature, and that was the true reason of the old books, and not the reason which Brook supposes in abridging the case of 11 H. 4, Faits 19, that otherwise the obligee might again recover thereupon. And therewith agree 9 E. 4, 51, a, 7 H. 4, 39, b, 11 H. 4, 73, b, 45 E, 3, 11, &c. And the court had consideration of the book in 17 E. 3, 24, where Edward Devon brought an action of debt on a bond of £20 against Richard Scott, who pleaded, that before the mayor and bailiffs of Newcastle upon Tine, the plaintiff by plaint on the same bond, recovered and had execution; and there, because the defendant did not procure the bond to be damned, the plaintiff had judgment to recover again, notwithstanding the former judgment and execution. And

there Shard said to the defendant, see now the deed be damned. But the court said, that the judgment was given because it was the defendant's folly that the deed was not damned on the former judgment. For in the time of E. 3, R. 2, and H. 4, it was held, that when a man did recover on a bond, that the bond (as hath been said) should be damned. Wherein the content and quietness of men in old times ought to be observed, that when judgment was given against them by course of law, they were satisfied therewith, without prying with eagles' eyes into matters of form, or the manner of proceeding, or of the trial, or insufficiency of the pleading, &c. to the intent to find error to force the party to a new suit, and himself to a new charge and vexation. But since men became more contentious, and not satisfied with any trial or judgment, but writs of error and attaints (which in old times were rare, and especially writs of error) were so frequent, as of more late time they were, the judges thought it dangerous to cancel the deed, either where the plaintiff recovered, or where he was barred by judgment, for in both cases the judgment might be reversed by error or attaint, and therefore the reason or cause of the said judgment in 17 E. 3 is now changed, and there is not any question but judgment and execution upon a bond, is a good bar in a new action thereupon; and therefore the said book of 17 E. 3 is not to be urged against this judgment. Also the court said, that if a man brings an action of debt on a bond, and is barred by judgment, so long as the judgment stands in force, he shall not have a new action. And as to the case which has been objected, that where two are bound jointly and severally, and the obligee has judgment against one of them, that yet he may sue the other, it was well agreed. For against him the nature of the bond is not changed, for notwithstanding the judgment, he may plead that it is not his deed. And afterwards in the case at bar, judgment was given against the plaintiff, and the doubt in 9 E. 4, 50, b, 51, a, where this matter is very well debated on both sides, well resolved.

WILLIAM RUNNAMAKER *v.* HENRY CORDRAY

ILLINOIS SUPREME COURT, JUNE TERM, 1870

[*Reported in* 54 *Illinois*, 303]

WRIT OF ERROR to the Circuit Court of Jasper county; the Hon. HIRAM B. DECIUS, judge, presiding.

The opinion states the case.

Mr. John H. Halley, for the plaintiff in error.

Mr. W. B. Cooper, for the defendant in error.

MR. JUSTICE WALKER delivered the opinion of the Court:

This was an action of debt, brought by plaintiff in error in the

Jasper circuit court, against defendant in error. A declaration was filed containing the common counts; he also sued out a writ of attachment. At the return term, defendant filed the plea of *nil debit,* and issue was joined. The cause was submitted to and tried by the court, without the intervention of a jury, by consent of the parties. On the trial, plaintiff in error proved that soon after the defendant in error came to the county, the transcript of a judgment from a justice of the peace in the State of Ohio, against defendant in error, was presented to him, and that he promised to pay it, but soon afterwards, said it was unjust, but he would pay it; and again, that he would pay it as soon as he could. He also introduced evidence, that defendant had said to different persons, that the judgment had followed him, and that he wanted to place his property in their hands to avoid its payment.

He then offered to read the transcript of a judgment for $130.50 and costs against defendant in error, rendered by a justice of the peace of Coshockton county, in the State of Ohio, in evidence, but, on objection, it was rejected by the court; and thereupon the court rendered a judgment for defendant in error for costs. Plaintiff entered a motion for a new trial, which was overruled, and he brings the record to this court and asks a reversal.

The first question presented, is, whether plaintiff could recover on the verbal promise of defendant to pay the judgment. Such a promise is without consideration, and cannot increase or change the liability of the debtor. The recovery of the judgment imposes the obligation to pay, and that obligation is in nowise increased or changed by the verbal promise. The verbal promise does not extinguish the binding force of the judgment. It remains unimpaired. Nor does the promise create a new debt or undertaking of binding force. If debt or assumpsit could be maintained on such a promise, an action could still be maintained on the judgment, thus giving two causes of action for one debt.

Nor can the original consideration, upon which the judgment was rendered, be recovered under the common counts.

That consideration was merged and extinguished by the higher security and obligation of record — the judgment. If it were not so, then several actions might be maintained in different forms, at the same time, for the same debt.

Lastly, it is urged that the court erred in rejecting the record of the judgment as evidence. It is a familiar rule, that the allegation and proof must correspond; and we are at a loss to perceive how a judgment can support the money counts in debt. A judgment may be declared on as such, but it cannot be evidence of money had and received, loaned, paid out and expended, or of an account stated. It is only the finding by a court, that one person owes another a certain specified sum of money, and a sentence that it be collected from the debtor. We have searched in vain to find a precedent for

such a recovery, counsel have referred to none, and it is believed that none exists. To recover, plaintiff in error should have declared, in the usual manner, in debt on the judgment, and then produced a transcript, properly authenticated, as evidence. We perceive no error in this record, and the judgment must be affirmed.

Judgment affirmed.

BACON *v.* REICH

MICHIGAN SUPREME COURT, June 9–October 3, 1899

[*Reported in* 121 *Michigan,* 480]

ASSUMPSIT by Elbridge F. Bacon against William Reich for goods sold and delivered. From a judgment for defendant, plaintiff brings error. Affirmed.

Bacon & Palmer, for appellant.

Louis C. Wurzer, for appellee.

HOOKER, J. The defendant recovered a judgment against the Architectural Iron & Wire Works for a breach of a contract. He was afterwards sued by the assignee of the iron works for the price of the articles furnished to him under the contract, the assignment being made before his action for damages was instituted. In this action he sought to set off or recoup his damages, which was permitted by the trial court. The plaintiff has appealed the case, contending that the claim for damages is merged in the defendant's judgment, and therefore will not again support an action or defence, and that the judgment cannot be set off against the plaintiff, for the reason that there is a want of privity. It is also claimed that the plea was insufficient to warrant the admission of this proof.

It must be admitted that the plaintiff is not privy to the judgment, because he acquired his rights, whatever they are, before defendant began his action. Bartero *v.* Bank, 10 Mo. App. 76; Powers *v.* Heath's Adm'r, 20 Mo. 319; Mathes *v.* Cover, 43 Iowa, 512; Todd *v.* Flournoy's Heirs, 56 Ala. 99 (28 Am. Rep. 758); Marshall *v.* Croom, 60 Ala. 121; Cook *v.* Parham, 63 Ala. 456; Coles *v.* Allen, 64 Ala. 98; Winslow *v.* Grindal, 2 Greenl. 64; Weed Sewing-Machine Co. v. Baker, 1 McCrary, 579; Bigelow, Estop. 135, 136. He is privy, however, to the injury upon which defendant's judgment rests. It is also true that the claim of the defendant was merged in the judgment against the iron works, and the judgment would be a bar to another action, or an attempt to recoup damages, against the Architectural Iron & Wire Works. But the judgment could be set off in an action brought by the iron works, or an action might be brought upon it. We deem it unnecessary to cite authorities in support of these principles, which are elementary.

It is nevertheless true that the plaintiff took this claim subject to

the equitable right of the defendant to have his damages applied upon it, and all that can prevent is the technical rule that they are merged in a judgment against plaintiff's assignor. Theoretically, this may be said to be no hardship, because, if the defendant shall pay the plaintiff's claim, he would yet have the right to collect his judgment for damages, which would work out exact justice to all. Practically, however, this is not so, because he cannot collect his judgment. The iron works is insolvent, and was at the time the plaintiff, who was a stockholder in the concern, took his assignment, and the defendant cannot collect his judgment in any other way than to set it off against this contract obligation. Furthermore, the record contains evidence that he was ignorant of the assignment at the time he took his judgment, and had a right to suppose that, by obtaining the judgment, he had settled the question of his liability on the contract, and was led to do so to avoid liability in a garnishing suit, which was adjourned for the purpose. But for the previous assignment, this would have been so, because the judgment would have bound all persons afterwards acquiring title to the claim from the iron works.

"According to more recent cases, the doctrine that claims become merged in judgments is supported on the grounds that the allowance of a new suit is a superfluous and vexatious encouragement to litigation, injurious to the defendant and of no benefit to the plaintiff." 15 Am. & Eng. Enc. Law, 339, and cases cited.

The doctrine, if rigorously applied, may work hardship and injustice, and it seems to be lawful to disregard it in some cases. Thus, a foreign judgment does not bar an action upon the original claim. Vanquelin *v.* Bouard, 15 C. B. (N. S.) 341; Wilson *v.* Tunstall, 6 Tex. 221; Wood *v.* Gamble, 11 Cush. 8 (59 Am. Dec. 135); New York, &c. R. Co. *v.* McHenry, 17 Fed. 414. See, also, Olcott *v.* Little, 9 N. H. 259 (32 Am. Dec. 357). In Eastern Townships Bank *v.* Beebe, 53 Vt. 177 (38 Am. Rep. 665), it is said that:

"A foreign judgment, when shown in evidence, upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered. The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action."

In cases where, through mistake or fraud, it would be inequitable to treat such judgments as a bar, the doctrine cannot be invoked. The case of Ferrall *v.* Bradford, 2 Fla. 508 (50 Am. Dec. 293), is in point. We quote:

"The plaintiffs in the court below took judgment against only one of the joint obligors, and, when that fact is pleaded by the defendants in bar, they reply that they did only do so because their attorney was circumvented, and induced to dismiss the proceedings as to the other defendants, in consequence of the fraudulent representations of one of the defendants. It matters little as to the mode or manner in which fraud is effected. A court must look to the effect, and ask if the result is a consequence of the fraud. Here the defendants seek to avail themselves of a legal defence, arising from a state of facts which they themselves, by their fraud, have produced. They admit, virtually, by their demurrer, that the plaintiffs have been deprived of a legal right by their fraud, and they seek now, by their defence, to take advantage of their own wrong, — a defence admitted to arise from their own fraudulent act. The question now is, Will such a defence be available, tolerated, or allowed? Law, reason, justice and morality unite in a negative response. . . . At first blush, we thought we discovered some difficulty arising from the fact that only one of the defendants is alleged to have been guilty of the fraud; but it soon disappeared, for we find this principle broadly laid down, — that interests gained by one person by the fraud of another cannot be held by them; otherwise, fraud would always place itself beyond the reach of the court."

Clark *v.* Rowling, 3 N. Y. 216 (53 Am. Dec. 290), denies the unyielding character ascribed to merger, as shown by the following extract from the opinion of Mr. Justice Hurlbut:

"It is true that the notes, as evidence of an indebtedness, were merged in the judgment, which, being greater security, operated to extinguish the lesser; but does it therefore follow that the judgment to all intents became a new debt, and that the merger or extinguishment of the notes was so complete as that, for the purpose of protecting the defendants in an equity connected with their original indebtedness, we may look behind the judgment, and see upon what it was founded? A judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt in a new form, so as to prevent a technical merger from working injustice. And this exception to the doctrine contended for by the plaintiff has obtained, especially in cases of insolvency and bankruptcy, for the protection as well of the creditor as the debtor, and has been applied impartially for the benefit of both."

In Stevens *v.* Damon, 29 Vt. 521, it was held that:

"The judgment of the justice in such a suit will not be a bar to a subsequent suit for the recovery of the account of the plaintiff which was not presented, if its presentation was omitted by mistake, or for any other sufficient reason."

See Cramer *v.* Manufacturing Co., 35 C. C. A. 508, 93 Fed. 636; Fox *v.* Althorp, 40 Ohio St. 322; Kane *v.* Morehouse, 46 Conn. 300 (closely resembles Stevens *v.* Damon); Wyman *v.* Mitchell, 1 Cow.

316, and other cases cited in the case of Clark *v.* Rowling, *supra;* also, Johnson *v.* Insurance Co., 12 Mich. 216 (86 Am. Dec. 49).

In the case before us, there is evidence from which it might be found that the course taken by the defendant in procuring a judgment for the breach of the contract was due to the concealment on the part of the iron works of the fact of the transfer of the claim, or, at least, of the mistake of the defendant in supposing that it belonged to the iron works at that time. We think the hardship and injustice of a strict application of the rule of merger is so apparent that we are justified in considering the case within the principle of the cases cited, and holding that, although the plaintiff was not strictly in privity as to the judgment, he was as to the cause of action upon which it was based, and that the defence made was proper. We think this conclusion renders it unnecessary to discuss the subject of election of remedies raised by the briefs.

The further point is made that the defence was not admissible under the pleadings. The case began in justice's court. The plea was presumably oral, and consisted of "the general issue, notice of set-of and recoupment." This was not a sufficiently definite plea, under the case of Kerr *v.* Bennett, 109 Mich. 546, but it was amendable, and, had attention been called to it, doubtless would have been amended.

The objections shown in the record do not indicate that the sufficiency of the plea was attached. They are simply that certain questions and testimony were incompetent and immaterial. That might mean that the plea was insufficient, or that the defence of recoupment could not be proved because of the former judgment, which seems to have been, then, as here, the main contention. Such objections are admirably adapted to the concealment of the real point relied upon, and we have often held that they will not justify a reversal. The authorities are collected in the recent case of Detzur *v.* Brewing Co., 119 Mich. 282.

The judgment should be affirmed.

MOORE and LONG, JJ., concurred with HOOKER, J.

GRANT, C. J. (*dissenting*). This suit is originated in justice's court. Defendant entered into a contract with the Architectural Iron & Wire Works, a corporation, by which it agreed to furnish defendant certain iron trusses for the sum of $400. The iron works, being indebted to the plaintiff, assigned the amount due upon the contract to him. The justice returned that "the defendant pleads the general issue, notice of set-off and recoupment." Defendant, claiming a breach of contract, sued the iron works, and recovered a judgment for $358 damages, from which no appeal was taken, and the judgment remained in full force and effect. It was admitted that $100 was due upon the contract. The court permitted the defendant to recoup damages, and verdict and judgment were rendered for him.

1. The notice of recoupment was too indefinite to permit any evidence under it. Kerr *v.* Bennett, 109 Mich. 546; Roethke *v.* Brewing Co., 33 Mich. 340; Delaware, &c. Canal Co. *v.* Roberts, 72 Mich. 49; Darrah *v.* Gow, 77 Mich. 16. Had objection been seasonably made, it should have prevailed, unless defendant had asked leave to amend. But the record discloses that this point was not raised until the testimony was concluded, and then the plaintiff requested the court to instruct the jury "that, under the plea and notice filed in this case, the defendant cannot be allowed for any of the items of his claim." Under the record as it now appears, plaintiff saw fit to go to trial in both the justice's and circuit courts without any objection to the sufficiency of the plea and notice. We think a plaintiff should not be permitted to raise such an objection at the close of the trial.

2. Defendant, claiming damages for violation of contract on the part of the Architectural Iron & Wire Works, had two courses open to him. He could have waited until the iron works or its assignee sued him, and then have recouped his damages, or he could have brought an independent action for damages. He chose the latter. The tort became merged in the judgment, which became a new debt, unaffected by the claim upon which it was based. Judgments are contracts, and are subject to set-off in actions of assumpsit. 1 Freem. Judgm. § 217; 15 Am. & Eng. Enc. Law, 338, 339. The latter authority states the rule as follows:

"And the present rule undoubtedly is that no second suit can be maintained on the same cause of action, irrespective of the question whether the judgment in the first suit was of a higher or lower nature than the cause of action; the reason for the rule being that the judgment is a judicial determination of the right of the parties, into which the plaintiff has voluntarily elected to transform his claim."

The authorities in support of this are cited in note 7.

The general rule, as above stated, is admitted, but it is urged that that there are exceptions to it, and that the present case forms one of the exceptions. In Eastern Townships Bank *v.* Beebe, 53 Vt. 177 (38 Am. Rep. 65), the opinion recognizes the rule, but appears to limit it to domestic judgments. The opinion says:

"It [the judgment] is not so merged unless it has become a debt of record, so that the record itself has become a cause of action . . . . The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action."

The same rule was announced by this court in Bonesteel *v.* Todd, 9 Mich. 371 (80 Am. Dec. 90). We are not dealing with a foreign judgment, and the rule of those cases does not apply.

In Ferrall *v.* Bradford, 2 Fla. 508 (50 Am. Dec. 293), suit was

brought against three parties upon a joint bond. The Bradfords, by fraud, procured a judgment to be rendered against the other obligor alone. The court would have applied the maxim, "*transit in rem judicatam,*" but for the fraud of the defendants. In that case there was no judgment against the defendants, but only against their joint obligor. So, it was held in Bonesteel *v.* Todd, *supra,* that a judgment rendered against two joint debtors in the State of New York, one of whom was not served with process and did not appear, did not bind the party not appearing, and did not prevent the plaintiff from suing upon the original cause of action in this State. In Clark v. Rowling, 3 N. Y. 216 (53 Am. Dec. 290), the sole question was the effect of a discharge in bankruptcy upon a judgment rendered after the petition in bankruptcy was filed, the decree in bankruptcy being rendered after the judgment was taken. The basis of the decree in Clark *v.* Rowling is found in Wyman *v.* Mitchell, 1 Cow. 316, where the same questions arose. Of that case the court, in Clark *v.* Rowling, say:

"And the court held that, although the original undertaking of the defendant was so merged in the judgment that no suit could be maintained upon it, yet that it was proper to inquire into the time and circumstances of the contract upon which the first judgment was founded, for the purpose of taking the case out of the operation of the defendant's discharge."

All the cases there cited involve the effect of a discharge in bankruptcy.

In Stevens *v.* Damon, 29 Vt. 521, the sole question litigated was whether items omitted by mistake from an account sued upon in justice's court were merged in the judgment, upon the ground that a party cannot split up his cause of action. It is there said:

"Ordinarily, such a judgment will bar a subsequent suit on the account so omitted, as the plaintiff cannot divide his account and make it the subject of several actions."

A like case is Kane *v.* Morehouse, 46 Conn. 300.

In Fox *v.* Althorp, 40 Ohio St. 322, the sole question was the right of the plaintiff to maintain four suits for monthly instalments of overdue rent. Four suits had been begun before a justice of the peace for the instalments due on the 1st days of September, October, November, and December. Judgment was rendered in the suits involving the September and October instalments, and the justice then rendered judgment upon the same evidence in each of the other suits. Defendant paid the judgments for the instalments due in November and December, and appealed the other judgments to the common pleas, and there pleaded satisfaction of the judgments in bar. The court found that practically the four suits were tried as one, and the court based its judgment upon the ground that the defence was purely technical, and that defendant acquiesced in the severance. In Cramer *v.* Manufacturing Co., 35 C. C. A. 508, 93

Fed. 636, the sole question was whether a party was bound by a judgment rendered in a suit brought by him against another defendant, and whether such judgment was *res judicata* as to the latter suit. The decision was based upon the fact that the real party defending had not done so openly, to the knowledge of the opposite party, and therefore was not bound by the judgment.

In these cases it was not sought to reopen the judgments for the purpose of contesting the original causes of action, where judgments had been rendered against defendants who had been served with process, or who had appeared and contested the suits. Nor do they involve a case like the present, where the party, having a choice of two remedies, has chosen to bring his suit for damages. Defendant, Reich, had been garnished, and evidently disclosed in the garnishment suit his claim for damages, which was greater than the amount due upon the contract. Evidently, at his request, the garnishment suit was held to permit him to establish in a separate suit his claim for damages. I see no reason why he could not have made that defence in the garnishment suit, which would have wiped out the claim assigned to Bacon. I find no evidence of fraud or deception on the part of Bacon or his assignor in the assignment of this claim, or any evidence that it was assigned for the purpose of defeating Reich. The rule of law involved cannot, in my judgment, be changed by the fact that the iron works has become insolvent. The original cause of action in Reich against the iron works has, in the language of Eastern Townships Bank *v.* Beebe, 53 Vt. 177 (38 Am. Rep. 665), become so merged in the judgment "that the record itself has become a cause of action." The only office which that judgment can now serve is as a set-off. Huntoon *v.* Russell, 41 Mich. 316.

Judgment should be reversed and new trial ordered.

MONTGOMERY, J., concurred with GRANT, C. J.

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